

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC.,

Appellant

vs.

D. W. BOOMHOWER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED

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(i)

No. 13,518

**APPELLANT'S STATEMENT
OF QUESTIONS PRESENTED**

Appellant states that the questions presented are:

1. Whether the misrepresentations of facts admittedly made by appellee to appellant, in selling his business, were material misrepresentations of facts as a matter of law, which resulted in the loss to appellant? (The trial court failed to find what the admitted misrepresentations were, as required by Federal Rule 52, but they are proven by the uncontradicted evidence.)

2. Was appellee a director, vice president and fiduciary of appellant (or a mere "dummy"); and did appellee fail to discharge contractual and fiduciary duties to appellant to disclose to appellant timely his knowledge of attempted embezzlement of appellant's property by its vice president, and fail to aid the business in any way he could, with the resultant losses to appellant?

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UNITED STATES COURT OF APPEALS
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vs.

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Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action by appellant as a Delaware corporation was commenced by personal service of process upon the individual defendant in the District of Columbia (a citizen of Florida), involves more than \$3,000, and seeks to recover damages (a) from misrepresentations by appellee of material facts in selling its business to appellant, and (b) from appellee's breach of fiduciary duties as a director and vice president of appellant. (Complaint, Tr. 435-438). Jurisdiction of the trial court is given by sections 11-305 and 11-306 of the District of Columbia

Code and by section 1332, Title 28 U. S. Code. Jurisdiction of this Court on appeal is vested by sections 1291, 1294, and 2106, Title 28 U. S. Code.

STATEMENT OF THE CASE

The complaint (Appendix 1) alleges that appellee sold appellant his medical equipment business in Washington, D. C. on September 23, 1950 for many thousands of dollars, including a valuable franchise for the distribution in Washington, D. C., Maryland and Virginia of the x-ray and diathermy machines manufactured by H. G. Fischer & Co.; that appellee covenanted that he would cause such franchise to be transferred to and enjoyed by appellant; that appellee who became appellant's vice president and director was morally bound to perpetuate appellant's enjoyment of that franchise; that appellee, knowing that a prime condition of appellant's purchase of the business was that one Raney (the existing manager) would remain with appellant for three years as manager, covenanted and agreed with appellant that Raney would comply with his contract; that in consideration of the appellee's undertakings appellant employed appellee as vice president and director at \$100 per month for two years upon condition that he personally should make such sales as he could for the business from his new residence in Florida, and to give his advice and counsel to appellant, but without obligation as to time devotion.

It charges that appellant, wholly inexperienced in such business, relied upon the representations and undertakings of appellee; that appellee misrepresented to appellant, as an inducement to purchase the business, (1) that he had not, in theretofore conducting the business, contributed personally to the sales in the year preceding September 23, 1950 except in immaterial amounts, permitting appellant to believe that salesmen were responsible for the good sales in that year, (2) that so-called "walk-in" business by purchasers who came to appellant's place of business, without the need of sales' effort, was very substantial,

(3) that the business could be successfully conducted with only \$2,000 to \$5,000 cash working capital, and (4) that Raney would remain as manager for three years in compliance with his contract, and that he was the "best in the business."

The complaint charges that as a direct result of such misrepresentations appellant suffered damages of \$18,000.

For a second cause of action, appellant alleges that as a result of the foregoing misrepresentations, and the failure of appellee in March or April, 1951 to timely inform appellant of facts known to him, as a vice president and director, appellant lost the aforesaid franchise to distribute the products of the Fischer & Co. and the services of Raney, with damages to appellant of \$25,000.

The Court allowed the prayer for judgment to be increased to \$32,000. (Tr. 14)

For its third cause of action appellant alleges that appellee failed to comply with his contract as vice president and director, and breached his fiduciary duties; that appellee is liable to appellant for the \$800 fees paid to him; and that appellant is excused from continuing to pay appellee the monthly fees.

Appellee's answer is in effect a general denial; and appellee interposed a counterclaim for \$1600.00, alleging that such sum was due as the balance of a \$2400 obligation created upon appellant's alleged purchase of furniture and tools from appellee. (App. 5-6). The court's judgment dismissed the complaint and appellee's counterclaim. (App. 9)

After trial, the Court entered its findings of facts and conclusions of law. Its conclusion of law is that

"from the findings of fact hereinabove set forth, the conclusion of law is that defendant made no material misrepresentations of facts"

which resulted in any loss to the plaintiff. The "findings of fact herein-above set forth" are barren of any findings pertinent ~~only~~^{mis} to the representations of facts. Such fact findings are pertinent only to the question whether appellee was a fiduciary of appellant. Hence the conclusion of law that no material misrepresentations were made is baseless of facts. (App. 9)

The only controversial fact findings relate to appellant's charge of appellee's breach of fiduciary duty. Those findings are that appellee was a mere "dummy" officer and director of appellant owing appellant no duty or fidelity; that by the contract of sale of the business appellee sold appellant "furniture and tools of the business for an additional sum of \$2500" (in contradiction of the clear and controlling terms of the written contract itself), and that the payments appellant was required to make to appellee of \$100 per month were not salary as an officer and director (again in contradiction of the clear and controlling terms of the written contract, and the conduct of appellee); and that plaintiff's loss of the Fischer franchise was not due to appellee's neglect of duty.

Upon filing of the court's memorandum to the Clerk, appellant moved for a new trial and rehearing, which was denied May 17, 1956. (Tr. 448)

Upon filing of the court's findings of facts and conclusions of law and judgment on May 28, 1956 appellant filed its "Motion for New Trial and Rehearing, for Amendment of Findings of Facts, Conclusions of Law and Judgement" (Tr. 460) which was denied June 26, 1956.

STATEMENT OF POINTS

1. The Court committed gross error in failing to find specially the material facts of the misrepresentations made by appellee in inducing appellant to purchase his business, in violation of Federal Rule 52; and such material facts show the clear error of the court's negative conclusion of law that "defendant made no material misrepresentations of facts which resulted in any loss to plaintiff", which the

court says follows "from the findings of facts hereinabove set forth" which facts are wholly irrelevant to that question; and, thus, the Court's conclusion of law is a baseless conclusion, unsupported by facts.

2. The Court committed gross error in its only finding of facts that appellee sold its "furniture and tools" to appellant for \$2500, that the payments of \$100 per month to appellee were on account of furniture and tools and not as salary, that appellee was a "dummy" officer and director of appellant, and that appellant's loss of the Fischer & Co. franchise was not a proximate cause of appellee's infidelity, — because such findings are contradictory of the only admissible evidence before the Court consisting primarily of the written contract between the parties and the conduct of appellee.

SUMMARY OF ARGUMENT

1. Appellee, in the written contract of sale of September 23, 1950 misrepresented "that he has not contributed to the sales of the business except in immaterial amounts during the past year", thus inducing appellant to believe that the earnings' ability of the business was the sales' power of paid salesmen, and that the business could be conducted successfully without an active proprietor, which was not true. (Par. 1, Pl's. Ex. 1)

2. Appellee misrepresented to appellant that his manager, Raney, was trustworthy, that he would comply with his contract, that he would remain as manager for three years, and that he was the best in the business.

3. Appellee misrepresented that the business could be conducted with only \$2,000 to \$5,000 cash working capital.

4. Appellee, in the written contract of sale, misrepresented that he would make such sales as he could for appellant's business

without any further payment to him, and further misrepresented that the "walk-in" business was substantial.

5. The trial court's conclusion of law that appellee made no material misrepresentations to appellant, without any findings of facts whatever on such subject, is therefore gross error.

6. The trial court grossly erred in its conclusion of law (mistakenly labelled as facts) that appellee was a "dummy" officer and director, and that the payments of \$100 per month to him were not salary (in violation of the parol evidence rule, and in contradiction of the actual facts, and without any admissible evidence to support it), and that appellant's loss was not due, also, to Raney's perfidy and appellee's failure to report to appellant his knowledge thereof timely.

7. The attempted embezzlement of appellant's principal franchise and the sabotaging of its employees by its vice president Raney from January to April, 1951, and appellee's knowledge thereof and breach of his contract and fiduciary duties in failing to report the facts to appellant and to stop Raney's perfidy, resulted in the ruination of appellant's business.

ARGUMENT

I. Appellee Falsely Represented In The Contract Of Sale That He Had Not Contributed To The Sales Of The Business In Material Amounts

Appellant, pursuant to contract with its organizer, T. G. Benton, and appellee of September 23, 1950 purchased on October 2, 1950 appellee's medical equipment business, paying many thousands of dollars therefor. Included in the sale was a valuable franchise covering the distribution in the District of Columbia, Maryland and Virginia of the x-ray and diathermy machines manufactured by the Fischer & Co. (Admissions of appellee in answer to paragraphs 1-3 of the complaint; contract, Pl's. Ex. 1).

Appellee's written representation in said contract that he had not contributed to the sales of the business in the year preceding September 23, 1950 except in immaterial amounts was false. (Par. 1, Pl's. Ex. 1) Appellee knew that it was false. He concealed the true facts from appellant. He knew that appellant was inexperienced in the business (Tr. 27-8) He knew that appellant would rely upon the same because appellant expected to conduct the business profitably from the sales made by paid salesmen. (Tr. 232; 231-2)

Appellee swore that his written representation was correct, that he was not active in the year preceding the sale, but he could not testify to the amount of sales he made personally. (Tr. 24-25) He denied on oath that he materially contributed to sales in that year. (Tr. 161) He testified falsely. His previous testimony in a deposition in the Municipal Court on July 16, 1953 was that for the year ending October 1, 1950 "I spent most of my time here that year" — "I was actively engaged in the business again". (Tr. 68) He testified that "If I was active I would show good sales"; that what would be material sales would depend on how active I was in the business. (Tr. 168-9)

The true facts are: Appellee's bookkeeper, Brown, confirmed that appellee was very active in that year, that he was a fine and aggressive salesman, that he contributed potentially to the sales, and was very forceful in culminating sales. (Tr 196-8).

The uncontradicted evidence shows that appellee personally made sales amounting to \$29,529.54 (Churchill, Tr. 210-11, Brown, Tr. 193-196), or 27% of the total sales of \$110,000 for the year ended September 30, 1950, with the firm profit on his sales of \$5,458 (Tr. 211, 38). That compares with total net income of appellee's business in 1949 of \$7,054 on sales of \$130,650 (Sauer, Tr. 214, 218-20). In other words the profit on sales made personally by appellee was equal to 77% of the total net income from his business in 1949.

It follows conclusively that appellee's written representation was false, and in most material particulars. If appellant had known that such representation was false, and that the success of the business depended upon D. W. Boomhower's sales, appellant would never have purchased the business.

Appellant had believed such false representation, and did not learn that it was false until sometime after June, 1951 when Churchill, appellant's bookkeeper (now a C. P. A.) compiled the true figures. (Tr. 210)

The practical effect of the misrepresentation is: For appellant to have made a profit of \$5,458 on sales of \$110,000, appellant would have had to increase the expected sales volume to be contributed by salesmen to the extent of approximately \$60,000 because, on sales made by salesmen comparable to those made by appellee personally, the salesmen were entitled to one-half the profit. For instance, as the profit to appellee on \$30,000 of sales was \$5,400 without the payment of commissions, if half the profit had to be paid to salesmen it would have required \$60,000 of sales for the business to earn \$5,400.

Stated otherwise, as the sales personally made by appellee were \$30,000 (with net profit of \$5,458) out of total sales of \$110,000, the paid salesmen made sales of only \$80,000 for the year. And as appellee's total net income in 1949 was only \$7,054 on sales of \$130,650, it is apparent that the business earned no appreciable profit from sales made by salesmen.

Appellant relied upon appellee's representation, and understood that the earnings' power of the business was derived exclusively from sales made by paid salesmen (Tr. 231-2), and suffered substantial losses as a direct consequence of its inability to conduct the business profitably as appellee as the active proprietor had done, *infra*.

II. Appellee Misrepresented To Appellant The Trustworthiness Of Raney, His Manager, And Misrepresented That He Would Comply With His Contract And Remain As Manager For Three Years, And That He Was The Best In The Business, Whereas Appellee Knew That Raney Was A Dangerous Man And Willing To "Cut One's Throat".

Appellee had known his manager, Raney, who became appellant's vice president and manager on appellee's recommendation, since 1935 (Tr. 37-8). He knew that appellant had contracted for Raney's services for three years and that Raney was entitled to one-half of appellant's profits. He knew that appellant would not have purchased the business without such commitment by Raney, as appellee had recommended (Tr. 71); and he represented that Raney was an honorable fellow and the "best in the business" (Tr. 46-7, 51, 69); and he recommended Raney rather than anyone else (Tr. 69). He knew that Raney had agreed to remain as manager of appellant in the most efficient manner.

He falsely denied on oath that he knew of Raney's arrangement with appellant (Tr. 53). But he was impeached by his prior testimony in another case showing his express admission that he had seen Raney's

contract with appellant, (Tr. 70, Pl's. Ex. 2) committing him to remain for three years. Raney had contracted with appellant to serve appellant for three years as manager in the best and most efficient manner, knowing that appellant was purchasing the business on the strength of that commitment. He admitted that he knew Raney had a three year contract with appellant. (Tr. 74). He was confronted with his own letter to appellant of August 27, 1950 admitting his full knowledge of Raney's arrangement containing his proposal for the sale of the business, and stating:

"Ed Raney agrees to remain on as manager on the following - he is to receive one-half the net profit of the business, a drawing account of \$125 per week charged against his one-half of the net profit, any profit coming to Raney at the end of the year to be credited against his purchase of common stock in the new corporation."
(Pl's. Ex. 3, Tr. 54-6)

And appellee was confronted with appellant's letter of August 29, 1950 to appellee explaining that Raney's interest in the profits would be dependent upon his remaining for three years, and stating that if such requirement were not agreeable to Raney for appellee to wire appellant immediately. (Pl's. Ex. 4). Immediately upon appellant's purchase of the business, appellee as vice president of appellant wrote the Fischer & Co. about appellant, stating,

"Ed Raney will remain in full charge * * * "

and that he is an outstanding man in the business. (Pl's. Ex. 8, Tr. 72)
He testified and thereby admitted:

"I may have said that Raney said that he would remain for three years."

The proof in this action shows (a) that Raney, appellant's fiduciary (and partner) was engaged in the act of embezzling appellant's principal property right consisting of the exclusive franchise to sell the Fischer & Co. products in Washington, Maryland and Virginia, and in sabotaging

appellant's employees, in the fourth, sixth and seventh months of his employment, with large resulting losses to appellant, (b) that Raney was not an honorable fellow, and (c) that appellee actually knew of Raney's untrustworthiness, and falsified to appellant his trustworthiness. (Argument VII, infra)

Appellee, as appellant's vice president and director, knew from Raney's secret letter to him of April 1, 1951 that he was engaged in embezzling appellant's property (Pl's. Ex. 20), and he thereafter admitted to appellant's president that Raney "would cut your throat at any time", which statement appellee did not deny making in giving his deposition in another case involving one of the issues in this action (Tr. 138). But he denied making the admission in testifying in this action, in an obvious attempt to escape liability for his acts. Despite such knowledge of Raney's perfidy, and his admissions of knowledge of Raney's attempt to embezzle appellant's property, appellee had the audacity to testify in this action that Raney "is a very fine man." (Tr. 139) It proves his desperation to escape liability.

Appellee was anxious to sell his business at the particular time, and at the price at which he sold it, which explains his overreaching in misrepresenting the facts. (Tr. 29)

Appellant is not seeking to hold appellee responsible as a guarantor on the contract that Raney would remain for three years, as seemed to be the mistaken theory of the trial judge. Appellant seeks to hold him responsible, in damages, for his misrepresentations as herein detailed, including his misrepresentation of Raney's trustworthiness and that he would comply with his contract by remaining efficiently and honestly as manager for three years, as an inducement to appellant to purchase his business.

III. Appellee Misrepresented That The Business Could Be Conducted With Only \$2, 000 to \$5, 000 Cash Working Capital.

In examining appellee as to whether he had misrepresented that the maximum cash used in his business was \$3500, he testified that his cash balance from time to time was \$1139 to only \$3, 000, and that he operated on that amount of cash. (Tr. 163-4). He could not testify whether he made such representation,

"but it is all right. I could have made it because we did operate on that basis. "

But he then admitted that "lots of time I had ten or fifteen thousands available." Appellant's assertion that appellee made such misrepresentation is confirmed by appellee's certification to appellant's opening balance sheet showing cash on hand of \$4, 500. 00 (Tr. 122-124), thus implying that it was sufficient for the operation of the business.

Relying upon such representation by appellee, appellant commenced business with \$4, 500 of cash over and above the price paid for the business, but within six to seven months found it essential to provide the business with additional cash totalling \$32, 000 (Benton, Tr. 237); so that it was necessary for appellant to put a total of approximately \$50, 000 cash into the business, taking into account the \$18, 500 capital invested (Churchill, Tr. 201). Such experience is confirmation of the falsity of appellee's material representation.

IV. Appellee Misrepresented That He Would Make Sales Without Further Payment To Him, And That The "Walk-In" Business Was Substantial.

In paragraph 6 (e) of the contract of sale (Pl's. Ex. 1) appellee covenanted to aid the business in any way he reasonably could and to personally make such sales as he could for the business without further compensation.

Despite such written covenant, appellee falsely testified "I wasn't required to make sales" (Tr. 139-140), but that if he had made any sales "they certainly didn't amount to much." Appellee never made any sales for appellant. (Benton, Tr. 230)

Appellee admitted that he represented that his "walk-in" business was substantial, on which commissions were not paid to salesmen. (Tr. 164-5; 44) But his former bookkeeper testified that from October 1, 1950 through March 16, 1951 it amounted to only \$820.88, or at the rate of approximately \$1,700 per year (Tr. 198), compared with gross sales of \$130,650 for 1949 (Tr. 214, 218-220). Raney, appellant's vice president, and appellee's manager, testified that the "walk-in" business was not "very good." (Raney dep., p. 88).

The representation was of a material fact, and it was false.

The cumulative effect of the foregoing misrepresentations, and the betrayal of trust by appellant's successive vice presidents which resulted in the sabotaging of appellant's business (infra), was a net loss to appellant from operations of \$36,000 in the two year period October 2, 1950 to September 1, 1952. (Rickman, accountant, Tr. 199-202).

Plaintiff did not learn that the foregoing representations were not true until the discovery in April, 1951 of Raney's attempt to embezzle the Fischer franchise, and investigated the facts, and thereupon sought assiduously to sell the business and to reduce the losses, without success until September, 1952. (Benton, Tr. 233, 238, 241; Churchill 210-214.)

V. The Trial Court's Conclusion Of Law That Appellee Made No Material Representations To Appellant, Without Any Findings Of Facts Whatever On Such Subject, Is Gross Error

Judge Maguire's conclusion of law is:

"From the findings of facts hereinabove set forth, the conclusion of law is that the defendant made no material misrepresentation of fact"

which resulted in any loss to the plaintiff. And the findings of facts are barren of any such pertinent findings of fact! Hence, the conclusion of law is a baseless conclusion. It is a negative conclusion of law, without any basis of fact. The real facts as above shown compel the conclusion that material misrepresentations were made; and show that the conclusion of law is gross error.

The court's action is a clear violation of Rule 52 requiring that the court

"shall find the facts specially and state separately its conclusions of law."

The question whether admitted misrepresentations of facts constitute an actionable wrong is manifestly a question of law, as is the question whether a contract has been made, because it involves legal determinations; and when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake was committed by the trial court the judgment must be reversed even if there was some evidence to support the findings. Bach v. Friden Machinery Co. (6th Cir.), 155 F. 2d 362; Letcher Co. v. DaFoe (6th Cir.), 151 F. 2d 987; Kuhn v. Princess Lids, etc. (3rd) 119 F. 2d 704; Price v. Atlantic Coast Line (4th Cir.) 213 F. 2d 9.

As this court denied appellant's motion to remand the case for proper findings of facts (without opinion), appellant submits that it is proper and essential for this court to examine the record for errors of facts and law, in order that appellant will have a real hearing upon this appeal; otherwise appellant is remediless for the gross error of the trial court.

Appellant emphasizes that it is entitled to recover in this action its losses from the foregoing misrepresentations of facts, whether

or not appellee is responsible for the appellant's losses on the further ground that appellee breached its contract to aid appellee in any way he could and his fiduciary duties as hereinafter set forth, in failing to report his knowledge of the betrayal of trust by appellant's Vice President Raney.

Appellee's representations were false; they were of material facts; and appellant believed the representations as the inducing cause of its purchase of defendant's business. The law is simply stated in 17 Corpus Juris Sec., section 154, page 505:

"It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted on by another in entering into a contract, and which is so acted on, constitutes fraud and will entitle the party deceived thereby to avoid the contract. False representations, not sufficient to sustain an indictment for false pretenses, may be sufficient to vitiate a contract thereby obtained."

For the same reasons, an action at law for damages may be maintained.

VI. The Court Clearly Erred In Its Conclusions Of Law (Mistakenly Labelled As Facts) That Appellee Was A "Dummy" Officer And Director, And That The Payments of \$100 Per Month To Him Were Not Salary (In Violation Of The Parol Evidence Rule And In Contradiction Of The Real Facts And The Only Admissible Evidence.)

The Court mistakenly included in its findings of facts its conclusion of law that appellee was a mere "dummy" officer and director of appellant and did not owe appellant any fiduciary duty, — without any supporting facts. Such finding is one of law, just as is the question whether, on facts, a contract was made. Decisions, supra.

The basic, evidentiary facts upon which a proper conclusion depended, were not found. Such facts and evidence prove that the trial court's finding was merely its "hunch", — in contradiction of the

contract and the actions of the parties, the admissions of D. W. Boomhower, and in violation of the parol evidence rule.

In appellee's contract of sale of the business of September 23, 1950 (Pl's. Ex. 1, par. 3) he represented and covenanted that he ~~was~~ then the owner in good standing of the exclusive franchise to distribute in Washington, D. C., Virginia and Maryland the products of the H. G. Fischer & Co. (among others) and that he was privileged to and would cause to be transferred to appellant the said franchises on terms at least as favorable as the terms of the existing franchises.

Appellee agreed in the said contract to become a vice president and director of appellant, — that "Boomhower shall accept such post". Appellant agreed to cause to be paid to appellee "for his advice and counsel and/or his services, the sum of \$100 per month for a period of 24 months", for which appellee agreed to give his advice and counsel and to

"aid the business in any way he reasonably can from his new residence in Florida or elsewhere, and shall make personally such sales as he can for the account of the business, without any further payment to him as commission or otherwise on sales made to purchasers in Maryland, Virginia, and the District of Columbia." (Par. e, p. 3, Pl's. Ex. 1)

It was accordingly appellee's contractual undertaking, and his fiduciary duty upon election as vice president and director, to aid and protect the business, and not to do anything or permit anything to be done that would destroy appellant's enjoyment of its franchises and property. He failed to comply with that contract, and with his fiduciary duties.*

October 2, 1950 appellant, acting by appellee (D. W. Boomhower) and T. G. Benton as its two directors, elected appellee its first Vice President and Raney its other vice president and sales manager, the minutes of the meeting also showing:

* "He knew that the Fischer franchise was the most important asset of the business." (Benton, Tr. 229; Raney deposition, 69.)

"Upon motion duly made and carried the board of directors voted a salary to Mr. D. W. Boomhower as vice president and director of \$100 per month for his advice and counsel and for all services he should be able to render to the corporation, subject to further order of the board." (Page 2, Pl's. Ex. 40, Tr. 451-2, Motion to Correct Error in Record, Tr. 457-8)

He freely admitted that upon appellant's organization he became a director, vice president and stockholder. (Page 6, D. W. Boomhower deposition in Municipal Court case, Pl's. Ex. 21)

So that it was appellee, D. W. Boomhower, who elected himself a first vice president at a stated salary. He is estopped to deny that he was such director and vice president for pay, by reason of his own acts, and his own contract. He was no dummy.

The minutes of the same meeting also show that he, as one of the two directors of appellant, voted for the ratification by appellant of the contract of purchase of appellee's business and the assumption by appellant of the obligations of the contract (P. 2, of same minutes).

Appellee's several acts as a director and vice president as shown by writings prove that he regarded himself as a director, that he acted as such officer, and that appellant relied upon him as such officer for advice which he undertook to give in many instances. (Pl's. Exs. 24, 25, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38 and 39)

The minutes of the same directors' meeting show that appellee also subscribed to \$1,000 of the capital stock of appellant, and that as vice president he became a signing officer on bank checks of appellant.

October 6, 1950 appellee, as vice president of appellant, certified by letter to the H. G. Fischer & Co. to the formation of appellant corporation, and that the officers were

T. G. Benton, President

D. W. Boomhower, Vice President

and asked the Fischer & Co. to assure appellant of the continuation of the sales' franchise and its continued support and cooperation. And on the same date he wrote Fischer & Co. asking it to assure "us" (appellant) of the same dealer and cash discounts allowed under his former individual proprietorship. (Pl's. Exs. 8, 9) The Fischer & Co. replied to appellee as vice president of appellant October 12, 1950, expressing its purpose to extend to appellant all possible support and cooperation and extend to them the same discounts and terms as it had extended to appellee. (Pl's. Ex. 9 - two letters.). Such exclusive right to sell Fischer & Co.'s products in the Washington area was the property right that Vice President Raney sought to embezzle from January to April, 1951, which resulted in the ruination of appellant's business, and the knowledge of which appellee failed to report to appellant, and which appellee did nothing to prevent.

The Court declared (Tr. 105):

"From the facts so far, it would indicate that Mr. Boomhower was to be connected as vice president."

The same contract of sale of the business of September 23, 1950 expressly provided for the payment to appellee of prescribed prices for the stock in trade shown by the inventory thereof, and that appellant should also pay appellee

"2. On account of the property described in the inventory of furniture, fixtures and tools and so forth, the sum of One Hundred Dollars (\$100.00). (Pl's. Ex. 1, p. 2, par. 6.c.2.)

October 3, 1950 appellant gave appellee its check for \$100, marked:

"In full pursuant to paragraph 6 c of agreement between T. G. Benton or Boomhower, Inc. and D. W. Boomhower."

which check bears D. W. Boomhower's endorsement. (Pl's. Ex. 23)

The foregoing quotations from the contract of sale are the only provisions thereof relating to appellee's service as director and vice

president for salary, and to the sale of furniture and tools for \$100.

The basic facts shown above, and hereinafter, prove beyond doubt that appellee was not a "dummy" officer, and that he actually served as a director and vice president for pay and admitted such service.

A "dummy" is commonly known as a "straw" man who holds title to real estate for another. (Hegstad v. Wysiecki, 165 N. Y. S. 898). In this case appellee was a director and vice president in his own right for pay. No word of honor or practice can make a corporate directorship a mere position of honor free of responsibility. Van Schaick v. Aron, 10 N. Y. S. 2d 550, 170 Misc. 520. Once the office is assumed, it carries with it the burden of active and diligent service. Petition of Bender, 15 N. Y. S. 2d 4, 172 Misc. 674, reversed 17 N. Y. S. 2d 1020, 258 App. Div. 1041. Directors concealing and ratifying fraudulent purposes with full knowledge thereof, as appellee did in this case, are accountable therefor. Lifshutz v. Adams, 20 N. Y. S. 2d 839, 260 App. Div. 72. Bogart on "Trusts and Trustees", sec. 16, p. 88 says that directors are "agents with contractual obligations." The distinguishing feature of a de facto officer or director is that he is in fact occupying the office under color of right and performing its duties. McWhirter v. Washington Royalties Co., 17 Del. Ch. 243, 152 Atl. 220 (Del. Ch. 1930). Directors must save the corporation from loss. Bodell v. Gen. Gas & El. Corp., 15 Del. Ch. 119, 132 A. 442 (Del. Ch. 1926).

The trial court was misled by inadmissible parol evidence of self serving declarations by appellee. Parol evidence is inadmissible to contradict, vary, add to or subtract from the terms of a written contract. The parol evidence rule is really a matter of substantive law designed to protect a party to a written contract against perjury and infirmity. Jones on Evidence, Third Ed. sec. 434; Folgelson v.

Rockfay Construction Co., 300 N. Y. 334 (1950); Raleigh Associations v. Henry, 302 NY 467; Guinsburg v. Blustein, 202 N. Y. S. 333, 121 Mis. Rep. 784; Matter of Yager v. Ajic Chemical & Surgical Co., 122 Mis. 561, 204 N. Y. S. 471; Ross & Sensibaugh v. McClelland, 262 S. W. 205; Henderson v. Scott Oil & Ref. Co., Tex. Civ. App. 258 S. W. 1082, 1086.

The trial court's conclusion of law that Appellee was a "dummy" officer was not based on any admissible evidence.

The contract of sale and the minutes of the directors' meeting in which appellee participated are the controlling evidence that appellee became appellant's vice president and director for pay of \$100 per month, and that fact is corroborated by every act of appellee as such officer, including his many writings. The contract of sale is also the conclusive evidence that the furniture and tools were sold to appellant for \$100. There is no admissible evidence to support the trial court's finding that appellee was a "dummy" officer. There is no such thing as a "dummy" officer — director and vice president. One accepting such official position is either a de jure or de facto officer, and he is responsible for the duties of the office. If he fails to discharge such duties, he betrays his trust.

When appellant took appellee's deposition, appellee's counsel insisted that the contract of sale of September 23, 1950 "speaks for itself, and I submit that any evidence that tends to vary the terms of that contract is inadmissible." (Pl's. Ex. 21, D. W. Boomhower deposition in Municipal Court, p. 8, p. 18, the whole of which deposition appellee's counsel consented to be introduced, Tr. 67).

The trial judge struck the self serving declaration and volunteered statement of appellee that prior to the contract of sale of September 23, 1950 the parties had agreed on the price of the furniture and tools at \$2,500, immediately following his observation of the contract terms

providing otherwise, and upon objection by counsel for appellant based on the parol evidence rule (Tr. 101-3). In addition to the court's exclusion of such evidence for those reasons, such evidence would be clearly violative of the parol evidence rule. Moreover, such evidence is is parol evidence of alleged negotiations preceding the reduction of the agreement of the parties to writing, and it is merged in the contract of sale itself which contradicts conclusively that such was the agreement of the parties.

Similarly, appellee's counsel tried unsuccessfully to prove that the fixtures were sold for \$2,500 by appellee's letter of August 27, 1950 (written long before the contract of sale of September 23, 1950, which appellant had offered merely to show appellee's agreement that Raney would remain as manager for three years. (Pl's. Ex. 3, Tr. 104-5). The terms there set forth are a mere proposal to sell appellant the "fixtures and good will (not tools) for \$2,500." The Court promptly stated:

"I am not concerned with that." (Tr. 104)

And then the court properly said, in correcting appellee's counsel:

"From the facts so far, it would indicate that Mr. Boomhower was to be connected as vice president." (Tr. 105)

So that that letter was not taken as evidence of the price at which the furniture and fixtures or tools were sold in the contract of September 23, 1950. Any such proposal is merged in the final terms of the written contract — elemental law.

Then, at the conclusion of the trial, the trial judge reversed his position during the trial, and relied solely on a self serving, voluntary and isolated declaration by appellee, made seven months after the contract of September 23, 1950, for his conclusion that appellee was a dummy vice president and director. (Tr. 247, 249-251). It is appellee's letter of April 5, 1951 to appellant's president (Pls. Ex.

26) in reply to the latter's letter to him of April 2, 1951 (Pl's. Ex. 25). Appellee's letter of April 5, 1951 was written as a director and vice president of appellant, responding to appellant's request for business advices which appellee as a director and vice president undertook to give appellant in pursuance of his contractual obligation to aid appellant in any way he could as such officer. Coincidentally, appellee asked:

"Will you please check with your bookkeeper, I have not received my check for \$100.00 on the fixture set-up for February and March."

Appellant had introduced that letter for the sole purpose of showing that appellant was acting as vice president and director, as required by his contract, as late as April, 1951, and under no conceivable circumstances can the self-serving voluntary declaration by appellee change the fact that he was actually acting as a director and vice president.

The court ignored an equally cogent declaration by appellee in his letter to appellant of April 23, 1951 (Pl's. Ex. 28):

"In your letter you failed to advise me why I have not received my check for \$100 per month as per our agreement. This is for February, March and April."

"Our agreement" is solely and exclusively the contract of sale of September 23, 1950. Appellee thus admitted that such written agreement was controlling, and it is the only evidence before the court of the contract of the parties.

Appellee again contracted with appellant on May 11, 1951 and expressed his knowledge that the \$100 monthly payments were "on account of services" for February, March and April, 1951 (Pl's. Ex. 31, Tr. 116). The parties compromised appellant's claim that appellee owed appellant \$225 on another subject, by agreeing that appellee would pay one half of it, and thereupon appellee accepted from appellant \$300 "on account of services" for three months, less \$112.50. He received

a total of \$800 salary for 8 months, through May, 1951 (Tr. 99). Appellee is therefore estopped not only by the contract of September 23, 1950, and his action as a director at the directors' meeting of October 2, 1950, but by his contract of May 11, 1951, to assert that the \$100 per month was on account of furniture and tools or fixtures.

Appellee admitted that he was an officer of appellant, that he never resigned as such, but claimed that he had ceased to be such officer only because of a delay, for the above reasons, in receiving his \$100 per month. (Tr. 98, 129-130).

At the time of the settlement agreement of May 11, 1951, appellee as director and vice president of appellant, spent two weeks in appellant's place of business in Washington in May, 1951. He wrote Fischer & Co. to that effect on May 28, 1951 (Pl's. Exs. 11 and 30):

"I spent two weeks in Washington during the month of May, one of them in the store helping Thad Benton (Plaintiff's president) interviewing new salesmen and to reorganize his staff. His sales are holding up and they seem to have a lot of nice business on the fire. I believe they will produce some real business with this new set-up and there seems to be a lot of enthusiasm among the men to do this. While I was there, Thad hired Picker's top service man and he should bring them in plenty of business, he has been in the Washington territory for 8 years for Picker. One thing they need is a source of x-ray films and chemicals where they can buy and get delivery on large orders. May be you can help them on this. With the former Picker man with them, they should take a lot of this business from old Picker customers."

See also Tr. 98, 106, 126, Pl's. Ex. 33 showing appellant's letter of May 16, 1951 to D. W. Boomhower as vice president at its place of business and asking his advice and counsel, (Pl's. Exs. 21, 26, 32, 27, 34, 28, 38, Pl's. Ex. 21, D. W. Boomhower deposition in Municipal Court, p. 27, 37-38, 40), when, as appellee testified: "You (appellant's president) asked my help and I willingly offered it."

Such exhibits prove conclusively that appellee was acting as a director and vice president.

He testified that (at page 37):

"I remember advising you at the time that any action or any recommendation I made were on your behalf (appellant's)".

Whenever appellee was in Washington, he "always called on" appellant "and offered any help if I could be of any help. If Mr. Raney was there, I would see him." (D. W. Boomhower, Tr. 115.)

The foregoing is conclusive proof-positive that appellee was a director and vice president, and that he acted as such — not as a dummy —, and that any contrary finding is not based on any evidence.

VII. The Attempted Embezzlement of Appellant's Principal Franchise And The Sabotaging of Its Employees By Its Vice President Raney From January To April, 1951, And Appellee's Knowledge Thereof And Breach Of His Contract And Fiduciary Duties In Failing To Report The Facts To Appellant, And To Stop Raney's Perfidy, Resulted In The Ruination Of Appellant's Business.

Appellant's vice president-manager Raney enjoyed a written contract with appellant for three years of service to which Raney was committed and for service in the "best and most efficient manner", with a drawing account of \$125 per week and the right to one-half of appellant's net profits. He was required by contract to personally make sales the commissions upon which would equal his drawing account. The contract expressly recognized that appellant was purchasing the business "upon the strength of the belief" that he "will remain as sales manager" for three years (Pl's. Ex. 2; Raney deposition, p. 68). His position was so important that he approved on October 2, 1951 in writing appellant's contract of the purchase of the business from appellee. See additional facts, Argument II, supra, including appellee's assurance to appellant that Raney was an honorable, trustworthy fellow, and the best in the business, and proof that appellee knew such facts to be false. Appellee as appellant's director, voted to elect Raney a Vice President.

Raney thus became appellant's fiduciary, and partner, charged with the highest possible degree of honest devotion to his trust, all of which appellee well knew.

Raney knew that the Fischer franchise for Washington, Virginia and Maryland was appellant's principal asset. (Raney deposition, pp. 69-70). He had known Mathis, the president of Fischer & Co. for thirty years; they were friends; and he knew he could address him confidentially. (Raney deposition, p. 70)

In January, 1951 - the fourth month of his service to appellant - Raney, when in Chicago on appellant's business and at its expense, laid his plan to embezzle appellant's Fischer franchise. He then asked Mathis "about the possibility of taking over Fischer exclusively in this area", - Washington, Virginia and Maryland, for himself. (Raney's clandestine, confidential letter to Mathis (undated), written from his residence in Washington, second paragraph.) He assured Mathis that he had capital available to handle the deal "here" and that he "can carry on in exactly the same manner as we (appellant) have in the past." His letter concluded:

"Knowing you as I do, Allan, and your sense of loyalty I will ask a straight question. Will you let me have this territory exclusively on my own and take it away from this arrangement (with appellant) as of the present? Please advise me at my home address above." (Pl's. Ex. 5)

In the same letter, he expressed to Mathis his belief that appellant's organization would disintegrate, that two of appellant's Virginia salesmen "have had enough", and that one of his best men was dissatisfied which we shall show hereinafter was false.

Raney testified that it was Dennis Kane (appellant's important salesman) who had agreed to supply capital, that Kane "was involved in the whole picture" with him, but that Kane had later double crossed him by reporting Raney's purposes to appellant and "squealed" on him by revealing to appellant his purposes. (Raney deposition, pp. 75, 108-9)

So there was Raney, as vice president and manager, conniving with appellant's other principal employee Kane to embezzle appellant's principal asset; and, following Raney's subsequent resignation because his position had become wholly untenable, appellant was required to install Kane as Vice President and Manager, without any knowledge that he too had betrayed his trust (infra).

Mathis, Raney's 30-year old friend, replied to Raney's letter on March 27, 1951, addressed secretly to him at his residence rather than appellant's business address, agreeing that

"We, of course, are agreeable to turning over our representation to you"

stating that his territory would be Washington, Maryland and stated parts of Virginia and West Virginia. He stated that "we will be ready to proceed along the lines under discussion when we have heard further from you." (Pl's. Ex. 6)

The Fischer Co. did not make any independent investigation of Raney's unfavorable statements to him about appellant; and he knew how scarce competent men are in this business, and that if appellant lost Raney it would suffer. He knew that Raney was a Vice President and Fiduciary with a profit sharing contract, so that in encouraging Raney to his betrayal of trust he was equally guilty. (Mathis deposition, p. 50; Pl's. Ex. 8, Raney's Letter of April 5, 1951 to Mathis, attached to Pl's. Ex. 7 - last paragraph.)

Raney replied on March 31, 1951 addressed from his residence again, stating that he was then ready to "move" (to take on the Fischer franchise), that he could keep the Roanoke man (Mr. Lox, infra), and another of plaintiff's salesmen, Holah in the Richmond area, and then admitted his knowledge of his own perfidy:

"How much time will you require to notify Boomhower, Inc. — which is only fair — of the cancellation of their franchise? I certainly do not wish it to be said at any time that there was any "SCULLDUGGERY" in the transaction."

His conscience was hurting him. He knew he was engaged in dishonesty toward his employer-partner. He knew that he was, in effect, embezzling appellant's property rights, but gestured that the degree of guilt would be less if reasonable notice of such completed embezzlement were given appellant.

Raney then clandestinely wrote appellee from his residence on April 1, 1951 transmitting the Fischer Co. letter to him of March 27, 1951 showing that Raney had obtained Mathis' agreement to give him the franchise, and asking him for \$5,000 to finance his handling of the Fischer franchise in the Washington area. (Pl's. Ex. 20; appellee, Tr. 77-78) He stated that he could take with him appellant's employees, Lox of Roanoke, Holah, Kane and Cissel. He stated that he could obtain the capital from another source, but that the financier wanted 50% of the profits -- undoubtedly meaning Kane whom he admitted was "involved in the whole picture with him," but who had squealed on his purposes, supra.

Appellee had long before known of Raney's plans to embezzle the franchise. He freely testified by deposition in the Municipal Court action (admitted in evidence in this case by the pretrial order of the court, and appellee's consent during the trial, Pl's. Ex. 21, p. 43):

"I talked with Raney when I was up here and tried in every way -- (the sense of the testimony is that appellee meant that he was trying to deter Raney in his purposes)

"Q. When?

"A. Every time I was in Washington or every time he called me on the telephone.

"Q. How often did he call you?

"A. That is hard to say, I don't know."

As Raney's undated letter to Mathis (supra) shows conclusively that Raney planned in January, 1951 to embezzle the franchise, that testimony by appellee confirms that he knew long before April, 1951 of Raney's dishonest purposes. Appellee at all times concealed such knowledge from appellant, when it was his duty to report the facts and to do everything within his power to prevent the embezzlement and the sabotaging of appellant's employees.

Appellee, in breach of his contract and fiduciary duties, even sought to induce Raney to go to work for him at Sarasota, Florida, well knowing that appellant had purchased the business on the strength of assurance by appellee that Raney would remain as manager for three years. (Raney deposition, p. 107)

Having learned of Raney's purposes from Kane's squealing on him, but not knowing that Kane had been Raney's confederate in embezzling the business, appellant wrote appellee April 2, 1951, seeking to fortify its position, by asking how additional salesmen could be obtained, and in particular asked:

"I should also like to have the exclusive benefit of your judgment as to whether Mr. Raney is sufficiently capable as an executive to run the business, — bearing in mind his particular abilities in perhaps other directions. Kane is doing quite well as a salesman — Randy is developing; another salesman failed, and we are in need of help in Maryland and Virginia. Kindly give me as many worthwhile names or sources of information as possible. I shall be pleased to hold your data confidential if you like." (Ex. 25)

Upon receipt of that letter appellee knew from Raney's clandestine letter to him of April 1, 1951 that Raney had succeeded in his effort to embezzle appellant's franchise, subject only to his ability to finance it.

Despite such positive knowledge, appellee wrote appellant April 5, 1951 purporting to discharge his duty, as a director and vice president, to appellant, by making suggestions about obtaining new salesmen, **BUT CONCEALING AND SECRETING HIS POSITIVE KNOWLEDGE, OBTAINED CLANDESTINELY FROM RANEY, OF RANEY'S DISHONEST PURPOSES, STATING ONLY:**

"Regarding Ed Raney. I have full confidence in Ed's ability to manage and train men, he certainly is qualified for the medical equipment business and there is no reason, if he is happy in his work and satisfied with the returns from his effort, why he can't get the best out of the business for you. If I were still in that business, I would like nothing better than to have Ed with me." (Pl's. Ex. 26)

In the light of his definite knowledge of Raney's betrayal of his trust, such letter by appellee is an affirmative concealment of the very facts which it was appellee's contractual and fiduciary duty to report. His betrayal of his trust, and omission to comply with his contract, and with his fiduciary duties, makes him as liable as Raney himself. (Decisions, supra, and infra)

To compound his breach of trust and breach of contract to aid appellee in any way he could, and in an attempt to exculpate himself from liability for his wrongs, appellee testified falsely that "there was nothing in the correspondence from Ed that would be of any use to you anyway", and that his only correspondence with Raney was

"after he made his change and he went with Fischer." (Appellee's deposition in Municipal Court, p. 18)

Such testimony is proved to be false by Raney's letter to him of April 1, 1951 and his reply of April 5, supra, while Raney was in appellant's employ, because Raney did not go to work for Fischer & Co. until April 16, 1951 (Mathis deposition, p. 39; Raney's resignation mailed April 11, 1955, Pl's. Ex. 19). He resigned because his position had become wholly untenable.

Appellant's president, Benton, confronted Raney on April 4, 1951 with the general knowledge of his perfidy, but without knowing the details thereof as shown by the foregoing correspondence, but based on Kane's squealing on Raney. Raney first denied it, but when Benton put in a long distance phone call to the Fischer Co. Raney admitted his secret

correspondence but would not exhibit it. (Benton, Tr. 238-9, Raney dep. pp. 77, 106, 109).

Having learned from Kane of Raney's purposes, appellant wrote the Fischer Co. on April 5, 1951 (Pl's. Ex. 12). Appellant was fearful that Raney had sabotaged its business, and sought to assure the Fischer Co. by an optimistic letter that it would be successful in marketing the Fischer Co. products, and extolling its salesmen, including Kane, all in an effort to thwart Raney's purposes to embezzle the franchise. That letter followed a telephone call appellant made to Mathis that morning for the same purpose. The letter stated that appellant's showing would have been better if it had "sooner learned of some of the conditions that were not conducive to still better results" (meaning appellant's general knowledge of Raney's perfidy). It explained that appellant would expand its Virginia and Maryland business, stating that it had made such arrangements with Mr. Lox in Virginia.

By letter of April 5, 1951 (attached to Pl's. Ex. 7) Raney wrote Mathis, knowing that Kane had squealed on him, condemning Kane and claiming that Benton and Kane were trying to "put one over on him" (by stopping his dishonest purposes), and asking that Mathis again hold his correspondence in confidence and not to give the same to appellant. He had the audacity to suggest to Mathis that appellant was trying to "chisel" him out of his profit sharing arrangement, when he knew well that he had betrayed his trust and that there were no profits to be divided.

Appellant's letter of April 5, 1951, supra, to the Fischer Co. was abortive because of Raney's letter to Fischer of the same date, and because, as hereinafter shown more fully, Raney had sabotaged appellant's business and informed appellant's Virginia representatives, Messrs. Lox and Otteson, that appellant was going broke, that he could and would get the Virginia Fischer franchise and that they should go to work for him and not for appellant, — whereas Messrs. Lox and Otteson

forthwith went to Chicago and got the franchise for themselves and it was forthwith taken away from appellant by Fischer's letter of April 9, 1951 (Mathis deposition, pp. 20-22, 30-31, 34, 37). So that the immediate loss by appellant of the Fischer franchise in Virginia was the very direct result of Raney's breach of his duty in sabotaging appellant, in his communications to the Fischer Co. and Messrs. Lox and Otteson. Such loss to appellant occurred notwithstanding the fact that its relations with the Fischer Co. had been agreeable and satisfactory. (Mathis deposition, p. 45)

Appellant was in such desperate need of salesmen that it offered Raney a position as a salesman under a proposed new written contract dated April 7, 1951, because appellant could control him in that non-managerial capacity, but not as a vice president and manager. After Raney first signed the agreement, he cut-out his signature and did not accept the position. (Raney deposition, pp. 109-110, 116, 122; Pl's. Ex. 18; Benton, Tr. 237-8, 240.)

Despite appellant's prayerful letter to the Fischer Co. of April 5, 1951, Mathis by letter of April 9, 1951 (the same date of its letter to appellant taking away its Virginia franchise) informed Raney that if Raney took the Washington area franchise it would give appellant one month's notice of cancellation, and stating the territory that would be assigned to him exclusively "IN ACCORDANCE WITH THE CORRESPONDENCE BETWEEN US" (Letter, attached to Pl's. Ex. 7). But, by then, Kane had deserted Raney and had squealed on his purposes, appellee would not invest \$5,000 with him, and Raney was thwarted in his purpose to embezzle the franchise.

It is thus clear that it was Raney's dishonest purposes from January through April, 1951, in confederation with Kane, Kane's dishonest purposes, Raney's sabotaging of appellant's employees, and the enforced resignation of Raney, that directly lead to the disintegration of appellant, with the immediate loss of the Virginia franchise, the subsequent

need to employ Kane as Vice President and manager without knowledge of his perfidy, and the resulting loss of sales power and loss of the whole Fischer franchise, which ruined appellant's business, as hereinafter noted more fully.

And such perfidy in appellant's organization was known fully by appellee D.W. Boomhower, who affirmatively concealed it from appellant, in violation of his duty to disclose it, and to take steps timely to prevent it.

Following Raney's capitulation he was offered a position with Aloe & Co. in Washington, a competitor of appellant, which he accepted in violation of his contract with appellant not to enter a competing business in Washington, and he resigned from appellant April 11, 1951. (Raney, deposition p. 122, Pl's. Ex. 19)

Then, when Mathis was in Washington April 12 (obviously for the purpose of completing with Raney his embezzlement of the Washington area franchise), and finding that Raney had failed to obtain financing to take over the franchise, he offered Raney a position as assistant to the president at Chicago, which Raney accepted as of April 16, 1951. (Mathis deposition, pp. 38-39)

Raney's sabotaging of Appellant's Virginia representatives, and franchise

Mr. Howard Lox was in partnership in Virginia with Mr. Otteson; they were interested in obtaining in particular the franchise to sell the Fischer & Co. products as direct representatives; they dealt in such products in 1951 through appellant only (Lox, Tr. 81-84). Lox met Raney in Virginia in March, 1951 as vice president of appellant, when installing a Fischer machine Lox had sold (Tr. 88). Raney informed Lox that appellant "would not be in business very long because of finances" and that he would be able "to get the Fischer franchise for himself" and asked Lox and his partner Otteson to join him as salesmen

in Virginia. (Tr. 88) Lox testified that he and Otteson went to Chicago shortly thereafter and acquired the Fischer franchise for themselves. (Tr. 89) He testified that prior to such discussion with Raney he had had an agreement with appellant to go to work for it in a matter of a few weeks, but did not go to work for appellant after Raney talked with him. (Tr. 90-91)

It is thus manifest that Raney's breach of duty to appellant in revealing to Lox that the Fischer Virginia franchise could be taken lead directly to the loss to appellant of that franchise, and the services of Lox and Otteson.

Raney testified falsely that he had not asked Lox to go to work for him, and denied that appellant had arranged positively for Lox to work for appellant. Then, he recanted, and merely testified that he did not recall it. (Raney deposition, p. 66) But his clandestine letters to the Fischer Co. and to appellee declared that he could take with him the Roanoke man, Lox (Pl's. Exs. 20, 7) and it is thus manifest that he had had such discussions with Lox.

Particular Value of Fischer Franchise

The Fischer Co. advertised nationally, and sent leads received by it from such advertising to its distributors where the interested customers were located. These leads were of excellent help to the distributors, and when the Fischer Co. took the Virginia franchise from appellant it ceased to send those leads in Virginia to appellant. (Mathis, deposition, pp. 17-18, 21-22)

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The trial court recognized fully Raney's perfidy, and betrayal of his trust, in stating:

"MR. HARDY: Your Honor, the activities of Mr. Raney and the condition of the business under him, and what happened to the business under his management is relevant here.

"THE COURT: I will accept it as a fact that Raney is every bit the villain he has been portrayed here by Mr. Benton. I will accept that, but accepting that, what has that got to do with Boomhower up to now?" (Tr. 235)

And at Tr. 236:

"THE COURT: * * I am assuming Raney was a villain of the deepest die, that he was everything Mr. Benton presumed to characterize him as, that he was guilty of dishonest purposes, that being the fact, if it is a fact, you can't tie up Boomhower with Raney, unless you have evidence to show so, so I am not concerned with Raney. I am concerned with Boomhower, and I have been concerned with Boomhower since this case started. I am concerned with both Boomhower and Boomhower, Inc.

"MR. HARDY: I think from what your honor has told me that you assume that Raney's activities did injure this business?

"THE COURT: I will assume that, but you can't leave it upon the shelf. You have got to bring it down and put it on the floor and put a lid on it."

The proof shows that Raney was an extremely dangerous person. It is inconceivable that appellee did not know of it, when he recommended him to be trustworthy, and when he admitted in May, 1951 to appellant that he would cut your throat.

In the case of Boomhower, Inc. v. American Automobile Insurance Co. in this court (now pending on motion for new trial, based on appellant's discovery of his clandestine correspondence with the Fischer Co.), being an action to recover under a fidelity bond for the acts of Raney and Kane, Raney testified falsely, but in this action he declared

that he had testified to the whole truth in that action (Raney deposition, pp. 71-72). Among other instances of his false testimony, are:

1. In the Insurance Co. case he denied emphatically that he had sought to acquire the Fischer franchise while a vice president of appellant, but that Fischer had voluntarily offered it to him (Tr. 288-9, 389-90). The testimony is absolutely false as shown by his correspondence with Mathis, supra, and his express admission in this case that it was he who first suggested that he wanted the Washington Fischer franchise, and he denied that he had testified contrarily in the American Automobile Insurance Co. case. (Raney, deposition, pp. 76-7)

2. In this action he denied emphatically that he ever saw the contract of sale between appellee and appellant of September 23, 1951 (Raney deposition, 84); and he made the same denial in the American Auto case (Tr. 102). His handwritten addenda to his contract of September 6, 1950 with appellant, dated October 2, 1950 shows that he expressly approved of such contract (Pl's. Ex. 2), which shows his testimony to be absolutely false.

3. In the American Auto case he denied that he requested Mathis to address him at his home (Tr. 277). The correspondence between him and Mathis, supra, shows the testimony to be absolutely false.

4. In the American Auto case he testified falsely that he had no written communications with Mathis between April 4, and 12, 1951 (Tr. 289). It is absolutely false as witness his correspondence early in April, 1951, supra.

5. He testified falsely in the American Auto case that his correspondence with Mathis did not concern appellant (Tr. 271-2, 276, 295-6), that it had relation to his going to work for the Fischer Co., and that there was nothing to conceal. His correspondence, supra, shows the testimony to be absolutely false; and he admitted in his deposition in this action that appellant knew nothing about it.

6. In the American Auto case he "certainly" denied under oath that he sought to raise capital and that he wrote D.W. Boomhower for capital to handle the Washington area franchise (Tr. 272-4, 350). His correspondence with Mathis and D.W. Boomhower, supra, show the testimony to be absolutely false. He falsely testified in the Auto case that he asked Boomhower for a loan because he did not have any idea what he was going to do (Tr. 376).

7. In the American Auto case Raney denied that he conspired with Kane to obtain the Fischer franchise (Tr. 400-1). In his deposition in this case he admitted that Kane would supply the capital and that he was involved in the whole picture, — meaning the purpose to embezzle the Fischer franchise (Raney deposition, 75).

Further proof of Appellee's knowledge of Raney's attempt to embezzle the Fischer Franchise, and his concealment thereof from Appellant

In addition to the proof of appellee's knowledge of Raney's perfidy, long before April, 1951, supra, appellee admitted in his testimony that Raney had informed him in March on long distance telephone that he wanted \$5,000 with which to take over the business (Tr. 113-4).

Appellee admitted in his testimony that he did not notify appellant of Raney's perfidy until May, 1951, when he came to Washington, and when he admitted to appellant that Raney would "cut one's throat any-time," supra.

Appellee admitted that his loyalty was not with appellant; that "I certainly didn't want to get in the middle between you and Raney" (Tr. 106, thus evidencing complete non-feasance to his employer, and entire willingness to protect his old friend). He admitted writing appellant April 5, 1951 in reply to appellant's letter of April 2 inquiring about Raney, and failed miserably to report his knowledge of Raney's infidelity that he knew so well by Raney's letter to him of

April 1, 1951 (Tr. 129). His alibi for disloyalty to appellant, and breach of his contract and fiduciary duties, he explained to be:

"The thing is, I started to say, in my correspondence with Raney I feel that it isn't fair, it wouldn't be fair with any men, anyone I had correspondence with that was personal correspondence, that I had to inform you (Benton) of every bit of correspondence we had." (Municipal Court deposition, p. 43.)

In other words, he testified in effect that he as a vice president and director of appellant could stand by and observe a co-vice president embezzle the employer's principal asset, without being fastened with the duty to take action — an astounding alibi, which confesses realistically his own perfidy.

The court recognized again appellee's infidelity (Tr. 190):

"MR. BENTON: Mr. Boomhower's (infidelity) in not doing his bounden duty by bringing that knowledge to this particular plaintiff that his employe was at that time doing these things.

"THE COURT: All right. I will assume that."

Appellant sought the aid of appellee in endeavoring to prevent the loss of the Fischer franchise, but appellee did nothing to aid appellant (Benton, Tr. 234). Although appellee knew Mathis for 15 years (Tr. 143), appellee was unable to give any satisfactory explanation of why he omitted to take steps with the Fischer Co. to prevent Raney's perfidy (Tr. 143).

Without knowledge of appellee's knowledge of Raney's perfidy, appellant wrote appellee April 13, 1951 informing him that Raney had resigned and that it wished to discuss that subject with him as soon as possible, and asked for advice in respect of obtaining new salesmen. (Pl's. Ex. 27) Appellee's reply of April 23, 1951 expressed sorrow that

"Ed Raney is no longer with your company. What happened? Ed sure knows the business and from the reports I have been getting here he was doing a good job on sales and the business was showing a nice increase." (Pl's. Ex. 28)

That is another instance of appellee's deliberate concealment of his knowledge of Raney's perfidy, obtained definitely from Raney's letter to him of April 1, 1951. Such concealment compounds appellee's guilt.

At appellee's meeting with appellant's president in Washington in May, 1951, in discussing Raney's perfidy, appellee freely declared that Raney would "cut your throat at any time." (supra) Yet, appellee wrote Mathis May 28, 1951 and, with loyalty to his old friend Raney stated to Mathis "I am happy to know Ed Raney is with you" — well knowing of the loss Raney's perfidy caused appellant (Pl's. Ex. 11). This is confirmatory of appellee's loyalty to Raney, and his disloyalty to appellant to which he was bound by contract and fiduciary ties.

Appellee in his letter to appellant of June 12, 1951 alleged that he misplaced his file of correspondence with Raney, and falsely stated twice that the correspondence was all after Raney left appellant's employ, and that "there was nothing in the correspondence from Ed that would be of any use to you any way, as it was all after he left your employ" (Pls. Ex. 38, supra).

Appellant's reply of June 19, 1951 (Pl's. Ex. 35) insisted that appellee should have brought his knowledge of Raney's perfidy to the attention of appellant immediately, and again demanded copies of the Raney correspondence; and stated that "deep principles compel follow-up, for reasons that should be apparent to you. So Don, please send on the correspondence to me as soon as possible, and I will thank you." Having received no reply, appellant again wrote appellee August 8, 1951 demanding copies of the correspondence, and stating that in view of developments appellant was compelled to suspend further payments to you of "the salary item." (Pl's. Ex. 36) February 9, 1952 appellant

again wrote appellee demanding the correspondence (Pl's. Ex. 37).

On June 16, 1953 when appellee's deposition was taken in the Municipal Court suit, he testified that he did not have the correspondence; that it disappeared, without explaining it satisfactorily (pp. 17-18). Appellant did not learn of Raney's letter to appellee of April 1, 1951 until it was produced at this trial; nor did it learn of Raney's correspondence with the Fischer Co. until Mathis' deposition in this action was taken at Chicago January 10, 1956 when Mathis produced it under subpoena.

The chain results of Raney's perfidy and Appellee's concealment thereof.

The direct losses resulting proximately from appellee's misrepresentations of facts inducing appellant to purchase the business, and from Raney's attempted embezzlement of the Fischer franchise, and his sabotaging of appellant's employees, and appellee's affirmative acts of concealment thereof, which prevented appellant from taking action timely to correct the abuses, were:

1. Loss of Raney's managerial services in April, 1951 and his failure to operate "in the best and most efficient manner" commencing in January, 1951, as required by his contract, and as known by appellee, and the complete disintegration of appellant's business (Benton, Tr. 239-240)

2. Loss in March, 1951 of its Virginia representatives Lox and Otteson, supra.

3. Loss in April, 1951 of the Fischer franchise for Virginia, and the leads to customers, supra, resulting directly from Raney's dishonest discussions with Lox in March, 1951 and his revelation to Lox that the Virginia franchise could be had, in violation of Raney's duty to appellant.

4. Losses from operations due to the foregoing, and from the need to engage Kane as Vice President and Manager (without knowing that he had been Raney's confederate and that he was guilty of betrayal of his trust, also), and who in July, 1951 was discovered by appellant (Tr. 239) to be dishonest, in appropriating \$50 cash of appellant to his own use, thus confirming to appellant his ineligibility with the result that his position was untenable and he resigned in July, 1951.

5. Appellant's inability to obtain competent managers and salesmen following Raney's sabotaging of the employees.

6. The resulting loss of sales power.

7. The inevitable loss of the whole remaining Fischer franchise early in 1952, following the inability to obtain managerial and sales force, when the franchise was given to Kane's company, District X-Ray Co. on RANEY'S RECOMMENDATION (to his confederate in crime, who had first agreed to finance Raney). (Mathis deposition, pp. 39-41, 60; Raney deposition.)

After resigning from appellant, Kane formed his own company in the fall of 1951 and sought to obtain the Fischer franchise (Mathis deposition, p. 40).

Plaintiff was thus forced to rely successively upon one Holah, and, later, one Cissel, to manage the business. Both were wholly unsuccessful. Plaintiff's sales suffered as a direct result of the loss of Raney and Kane, and as the further direct result thereof the Fischer Co. gave its Washington area franchise to Kane as of April, 1952, who had been seeking the franchise for sometime before then (Mathis deposition, pp. 40-42, 60). And the ruination of appellant's business was thereby confirmed.

It was the treacherous Raney — then Mathis' assistant — who was sent to Washington by the Fischer Co. and who recommended that appellant's franchise be terminated and be given to Kane — his former

confederate in the ruination of appellant's business (Raney deposition, p. 112; Mathis deposition, p. 56).

Plaintiff had sought assiduously to sell the business and minimize its loss, but was unsuccessful until September 1, 1952 when its business was sold to Kane's company, the District X-Ray Co., who had aided and abetted Raney's treachery (Benton, Tr. 241, Raney deposition, pp. 75-6, 109).

The resulting losses of appellant were:

Capital	\$18,500.00
Sums advanced by stockholders which appellant could never repay	18,092.75
	\$36,592.75

(Rickman, Accountant, Tr. 201-2) Those facts are uncontroverted, are controlling, and prove the loss of appellant.

The Law

Appellee was bound by contract to aid appellant in every way he could; and his fiduciary duty as a director and vice president imposed the same obligation on him to save appellant from loss. Bodell v. Gen. Gas & El. Corp., 15 Del. Ch. 119, 132 At. 442 (Del. Ch. 1926.)

"A trustee is held to something more than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." (Meinhard v. Salmon, 249 N.Y. 458, 468, 164 N.E. 545 (Judge Cardoza); Pratt v. Shell Pet. Corp., 100 F.2d 833.)

If two inferences may be drawn as to whether the conduct of the agent was to the damage of his principal, the inference that it was will be made. Ashman v. Miller, 101 Fed. 2d 85.

Liability definitely attaches to one knowingly lending his aid in any way to the perpetration of a fraud. Russell v. Post, 138 U.S. 425, 34 L. ed. 1009.

A director's culpable neglect gives rise to a corporation cause of action. Stevens on Corporations, sec. 147, p. 595, sec. 149, p. 595-597; and pages 599-600 where director failed to prevent misappropriation or misrepresentation.

In Duance Jones Co. v. Burke, 121 N.Y.S. 2d 107 it was held that where the advertising agency's original officers or employees conspired to form a new corporate advertising agency which immediately appropriated fully half of the original agency's customers and almost the entire trained working force of the agency, the officers or employees unjustly enriched themselves in breach of their fiduciary duty so as to be liable for damages - notwithstanding that the customers were not bound by contract to continue doing business with the original agency, and that the officers or employees had no contracts with the original agency for definite term and that they were free to quit the original agency and engage in competing activities. And, here, Raney was not free to quit; he was bound by a three-year contract; and Fischer Co. was not bound to continue its franchise indefinitely; but so long as appellant held it, it was a property right that Raney could not embezzle.

CONCLUSION

The appellee cannot conscientiously controvert the facts hereinabove set forth so fully with copious citations to the controlling evidence.

It is significant to observe that one of the cogent reasons for the error of the trial court throughout the case was the seeming inability to recognize dishonesty in Raney's attempt to embezzle the Fischer franchise - it being an intangible asset (Tr. 239-40); and his omission

to observe the real evidence of appellee's secret knowledge of Raney's perfidy and his complete failure to take steps to stop it.

We submit that appellee's misrepresentations of material facts were conclusively proved by the evidence, and that such misrepresentations and appellee's gross nonfeasance of contractual and fiduciary duty were the sole causes of the complete disintegration and failure of appellant's business; and that appellee must respond to appellant in damages for his wrongdoing.

Under Federal rule 54(c) the court is required to grant the relief to which the party is entitled, even if not perfectly pleaded or demanded in the prayer.

We most respectfully and confidently urge that the cause should be reversed, with directions to enter judgment for appellant for \$36,592.75.

THADDEUS G. BENTON
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New York, New York

RUSSELL HARDY, JR.
1012 - 14th Street, N. W.
Washington, D. C.

Attorneys for Appellant

(i)
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

435 [Filed April 28, 1953]

BOOMHOWER, INC.

1 Tulip Lane)

Short Hills, New Jersey,)

Plaintiff)

vs.)

Civil Action No 1921-'53

D. W. BOOMHOWER)

State of Florida,)

Defendant)

COMPLAINT ON CONTRACT

(1) Plaintiff is a corporation incorporated under the laws of the State of Delaware and defendant is a resident and citizen of the State of Florida. The matter in controversy exceeds the sum of three thousand (\$3,000) dollars, exclusive of interest and costs.

(2) Pursuant to contract of September 23, 1950 between plaintiff and defendant, defendant on October 2, 1950 sold to plaintiff the business theretofore conducted by defendant consisting of the sale of medical equipment and supplies. Plaintiff paid defendant many thousands of dollars therefor.

(3) Included in the aforesaid sale was a valuable franchise covering the distribution and sale in the District of Columbia, Maryland and Virginia, exclusively, of the x-ray and diathermy machines manufactured by H. G. Fischer & Co. Defendant covenanted and agreed with plaintiff that he would cause such franchise to be transferred to and enjoyed by plaintiff, and, therefore, and because of plaintiff's employment of defendant as plaintiff's Vice-President and director, defendant was morally bound to do everything reasonably within his power to perpetuate in plaintiff's favor the said franchise.

436 (4) Defendant knew that one of the prime conditions precedent to plaintiff's purchase of the said business was that defendant's manager, one E. M. Raney, would remain with plaintiff for three years as the manager thereof; and defendant covenanted and agreed with plaintiff that Raney would comply with his contract with plaintiff for three years of service, with the terms of which defendant was familiar.

(5) As a consideration for the undertakings of defendant as aforesaid, plaintiff promised to employ defendant at the rate of \$100 per month for two years, for which defendant undertook to give plaintiff his advice and counsel and to aid plaintiff in any way he reasonably could and to "personally make such sales as he can for the account of the business, without any further payment to him as commission or otherwise"; and defendant warranted that the aforesaid Raney was bondable for fidelity purposes.

(6) Plaintiff was wholly inexperienced in the aforesaid business, and relied upon the representations and undertakings of defendant. Plaintiff is informed and believes, and thus alleges, that as an inducement to plaintiff to purchase the said business, and knowing well that plaintiff would not purchase the said business if the facts were not as represented, defendant misrepresented to plaintiff:

(a) that the said Raney would remain with the business for three years in compliance with his contract with plaintiff, and that Raney was the best in the business;

(b) that the business could be successfully conducted with the sum of \$2,000 to \$5,000 as cash working capital over and above the many thousands of dollars plaintiff was required to pay defendant for the said business, including the stock in trade.

(c) that defendant had not contributed to the sale of the business except in immaterial amounts during the year preceding September 23, 1950, permitting plaintiff to believe that the said Raney and other
437 salesmen were responsible for the good sales of the business in the said year.

(d) that the so-called "walk-in" business by purchasers of defendant's products who came to purchase from defendant at his place

of business, without the need of sales effort, was very substantial.

(7) As a direct result of the aforesaid misrepresentations plaintiff suffered losses and damages of approximately \$18,000.00.

WHEREFORE, plaintiff demands judgment of defendant in the sum of \$18,000.00, together with the costs of this action.

Second Cause of Action

(8) Plaintiff repeats the aforesaid allegations.

(9) As a result of the aforesaid misrepresentations, and the failure of defendant in or about March or April, 1951 to timely inform plaintiff of facts known to him as a Vice President and director of plaintiff, defendant lost the franchise from the H.G. Fischer & Co. partly in 1951 and wholly in 1952, and the aforesaid Raney breached his contract with plaintiff and terminated the name in April, 1951 and obtained employment with the H.G. Fischer & Co., which contributed to the loss by plaintiff of the said franchise from the H. G. Fischer & Co., to the loss and damage of plaintiff in the sum of \$25,000.

WHEREFORE plaintiff demands judgment of defendant in the sum of \$25,000 together with the costs of this action.

Third Cause of Action

(10) Plaintiff repeats all the aforesaid allegations.

(11) Plaintiff promised to pay defendant a salary of \$100 per month for 24 months for his services as Vice President and director of plaintiff as aforesaid, subject to defendant giving his advice and counsel to plaintiff, to his aiding plaintiff in any way he reasonably could, and to
438 his personally making such sales as he could for the account of the business, which defendant omitted and failed to perform as required by his aforesaid contract with plaintiff, including defendant's failure to immediately inform plaintiff of facts which, if timely known by plaintiff, would have prevented the loss to plaintiff of the franchise from the H.G. Fischer & Co.

(12) Plaintiff discharged its obligations to defendant, until plaintiff learned the facts above alleged consisting of defendant's misrepresentations as aforesaid, and the breach of defendant's undertakings,

when plaintiff suspended the said payments in about May, 1951 of \$100 per month to defendant. Defendant demands that there be paid to him by plaintiff the said salary for the period ending September 30, 1952. Plaintiff denies that defendant is entitled to any further payments, and alleges that defendant is liable to plaintiff for the payments heretofore made to defendant consisting of approximately \$800.00 by reason of the aforesaid misrepresentations to plaintiff and the failure of defendant to comply with his said undertakings.

WHEREFORE plaintiff prays the Court to enter its declaratory judgment herein that defendant is not entitled to any further payments from plaintiff, and plaintiff demands judgment of defendant for the said \$800.00 heretofore paid to defendant by plaintiff.

/s/ Robert S. Caviness

Attorney for Plaintiff

1625 K Street, N. W.
Washington, D. C.

439 [Filed September 3, 1953]

ANSWER TO COMPLAINT ON CONTRACT

Comes now defendant, D. W. Boomhower, and for answer to the complaint herein shows as follows:

First Defense

The complaint and each cause of action contained therein fails to state a claim against the defendant upon which relief can be granted.

Second Defense

1 & 2. Defendant admits allegations contained in paragraphs 1 and 2 of the complaint.

3. Defendant admits that portion of paragraph 3 of complaint which alleges that sale included transfer of franchise, but denies each and every other allegations contained therein.

4 & 5. Defendant denies the allegations contained in paragraphs 4 and 5 of the complaint, and further answering paragraph 5 defendant
440 states that the \$100.00 monthly payments referred to were payments on certain office furniture and fixtures sold by defendant to plaintiff and upon insistence of plaintiff agreed to accept monthly payments therefor.

6. Defendant is without knowledge or information sufficient to form a belief as to the truths of the allegations contained in paragraph 6 of the complaint.

6 (a) (b) (c) (d). Defendant denies the allegations contained in paragraphs 6 (a) (b) (c) (d) of the complaint.

7 & 8. Defendant is not required to answer paragraphs 7 and 8 of the complaint.

9. Defendant denies the allegations contained in paragraph 9 of the complaint.

10. Defendant is not required to answer paragraph 10 of the complaint.

11. Defendant denies that plaintiff promised to pay him \$100.00 per month for the reason alleged, the \$2400.00 was in payment for store fixtures and office furniture of the business which the plaintiff

insisted "be represented as salary to be earned", because said plaintiff wanted the financial statement of Boomhower, Inc., to "show up good" and not as a liability against the corporation. Further answering said paragraph defendant states that he always gave the plaintiff any and all advise he was called upon to give and he denies every other material allegation contained in said paragraph.

441 12. Defendant denies that plaintiff discharged his obligations to him or that he at any time made any misrepresentations to plaintiff. He denies that he owes the plaintiff \$800.00.

13. Further answer said complaint, defendant states that plaintiff is indebted to him in the sum of \$1600.00 for which amount there is a suit pending in the Municipal Court. Defendant further states that if the plaintiff incurred any loss in the operation of the business, it was due to the neglectful manner in which he operated same and also due to the fact that he systematically milked the business and gave very little time to its operation.

WHEREFORE, having fully answered said complaint, defendant prays that it be dismissed.

TURCO & BOWLES

By Joseph C. Turco

Attorneys for Defendant
217 Southern Building
Washington, D.C.

DEFENDANT DEMANDS A TRIAL BY JURY.

Copy of foregoing answer mailed to Robert S. Caviness, Esq., Attorney for Plaintiff, 1625 K Street, N.W., Washington, D.C., September 2, 1953.

/s/ Joseph C. Turco

Attorney for Defendant

447 [Filed May 7, 1956]

MEMORANDUM TO THE CLERK
Judgment for Defendant.

I. Relative to first so-called cause of action, the Court finds there were no material misrepresentations of fact made by defendant to Benton, the ostensible agent for the plaintiff corporation to be and which was subsequently formed.

II. As to so-called second cause of action, plaintiff has failed to maintain burden imposed upon it to prove the facts alleged by the preponderance of the evidence.

III. The third cause of action was dismissed by agreement of the parties.

Counsel will prepare tentative findings of fact and proper order.
Judgment accordingly.

/s/ **MATTHEW F. McGUIRE**
United States District Judge

May 7, 1956

454 [Filed May 28, 1956]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard during this term, upon the pleadings, testimony, and the argument of counsel, whereupon, the court this 28th day of May, 1956 enters the following:

FINDINGS OF FACT

1. That on or about September 23, 1950, defendant sold to one Thaddeus G. Benton, or a corporation to be formed, his medical supply business including the inventory of salable merchandise for \$13,387.62 cash, and the furniture and tools of the business for an additional sum of \$2500.00, payable \$100.00 cash and the balance is \$100.00 monthly installments.

2. That immediately after the sale Benton transferred the assets of his purchase to D.W. Boomhower, Inc., plaintiff corporation which he had formed, and among other things, caused the defendant to be named as a director and officer of the corporation.

3. That the defendant was a mere "dummy" officer and director of the plaintiff and owed the plaintiff no duty or fidelity.

4. That the payments made by the plaintiff to the defendant under the contract of purchase, Paragraph 6(e) were in fact payments for the purchase of furniture and not salary as an officer and director of the plaintiff.

455 5. That the defendant took no part in Raney's efforts, if any were made, to cause the plaintiff to lose the H. G. Fischer & Co., distributorship.

6. That the loss of the H.G. Fischer & Co., distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity.

7. That the third cause of action was dismissed by agreement of counsel.

CONCLUSIONS OF LAW

From the findings of fact hereinabove set forth, the conclusion of law is that the defendant made no material misrepresentation of fact to Benton which resulted in any loss to the plaintiff; that the plaintiff is not entitled to the relief prayed for and the complaint should and is hereby dismissed with the costs of these proceedings to be taxed upon the plaintiff.

/s/ Matthew F. McGuire

Judge

456 [Filed May 28, 1956]

JUDGMENT

This cause came on for final hearing at this term of court upon consideration of the pleadings, the evidence and testimony adduced in the cause, including that of the plaintiff, and the court finding as a fact that there were no material misrepresentations by the defendant as alleged in his first cause of action; that the plaintiff failed to maintain the burden imposed upon it to prove the facts alleged in its second cause of action; that the third cause of action and the counter claim with respect thereto was dismissed by agreement of counsel, and the court concluding as a matter of law that the plaintiff is not entitled to the relief prayed for in its complaint, it is by the court this 28th day of May, 1956 adjudged as follows:

That the plaintiff's complaint and the counterclaim be and the same are hereby dismissed, with costs of these proceedings to be taxed upon the plaintiff.

/s/ Matthew F. McGuire

Judge

Seen:

/s/ Russell Hardy, Jr., Esq.,
Attorney for Plaintiff.

459 [Filed June 6, 1956]

NOTICE IS HEREBY GIVEN that Boomhower, Inc., the plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment contained in the "Memorandum to the Clerk" by Hon. Matthew F. McGuire, United States District Judge dated May 7, 1956 (if that be the judgment and the entry thereof), from the order of the Court of May 17, 1956 denying plaintiff's motion for a new trial and a rehearing and for order permitting minutes of plaintiff's directors' meeting of October 2, 1950 to be marked as Exhibit No. 40, and from the findings of fact and conclusions of law, and judgment entered herein May 28, 1956.

Dated: June 5, 1956.

/s/ THADDEUS G. BENTON

77 Park Avenue
New York, N.Y.

RUSSELL HARDY, JR.

1012 14th Street, N.W.
Washington, D.C.

Attorneys for Plaintiff-Appellant.

BRIEF FOR THE APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC., a corporation, *Appellant*

v.

D. W. BOOMHOWER, *Appellee*

**Appeal from the United States District Court for the
District of Columbia**

United States Court of Appeals

For the

District of Columbia Circuit

JOSEPH C. TURCO

Attorney for Appellee

217 Southern Building

Washington 5, D. C.

FILED DEC 11 1956

Joseph W. Stewart

CLERK

No. 13,518

APPELLEE'S STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee, the only question presented for the consideration of this Court is whether the appellee made misrepresentations or undertakings or concealment of breach of contract or fiduciary duties, the trial Judge having declared at the outset of the case that he was going to endeavor to establish either liability or non-liability and if there was no liability that was the end of the case (Tr. 15), and he found at the close of the plaintiff's case that there was no liability (App. 8-9).

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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC., a corporation, *Appellant*

v.

D. W. BOOMHOWER, *Appellee*

BRIEF FOR THE APPELLEE

**Appeal from the United States District Court for the
District of Columbia**

COUNTER STATEMENT OF CASE

The appellant omits all reference to the fact that the case was decided at the trial at the close of plaintiff's evidence so that no evidence was presented by the appellee.

There was no evidence to support liability of the appellee, as the trial Judge found.

SUMMARY OF ARGUMENT

1. The appellee was a "dummy" officer and director.
2. The payments of \$100.00 per month to the appellee were not salary, but were for the purchase of furniture and tools of the business.
3. The appellee was not responsible for the alleged attempted or so-called embezzlement of appellant's principal franchise or for the alleged sabotaging of its employees, and was under no obligation or duty, contractual or fiduciary, to report to appellant such facts, if any, as he may have known.
4. The appellee made no misrepresentations.

ARGUMENT

1—The Appellee Was a "Dummy" Officer and Director

In the appellant's sixth point, beginning on page 15 of its brief, it argues to the contrary of this point. At page 16 of its brief it states that appellee agree in the contract (Ex. 1) to become a vice-president and director, and at page 17 it asserts that appellee elected himself as first vice-president. The fact of the matter is that by paragraph 6(e) of the contract (Ex. 1) it was provided that:

"Benton shall, at his option, cause Boomhower to be elected a vice-president and/or director of such corporation as he shall cause to be formed, and Boomhower shall accept such post, under such limitation of power as a vice-president as Benton shall impose."

Accordingly, when appellee was elected first vice-president and director it was by reason of the fact that Benton exercised such option and caused appellee to be so elected. This certainly made appellee a "dummy" officer and director as the trial Judge found.

2—The Payments of \$100.00 Per Month to the Appellee Were Not Salary But Were for the Purchase of Furniture and Tools of the Business

The Court's finding of fact No. 1 (App. p. 8) is:

"That on or about September 23, 1950, defendant sold to one Thaddeus G. Benton, or a corporation to be formed, his medical supply business, including the inventory of saleable merchandise for \$13,387.52 cash, and the furniture and tools of the business for an additional sum of \$2,500.00, payable \$100.00 cash and the balance in \$100.00 monthly installments."

The findings of fact No. 4 is:

"That the payments made by the plaintiff to the defendant under the contract of purchase, paragraph 6(e) were in fact payments for the purchase of furniture and not salary as an officer and director of the plaintiff" (App. p. 8).

The clause of the contract 6(e) referred to by the appellant at page 16 of its brief is that:

"Benton shall in any event cause to be paid to Boomhower for his advice and counsel and/or services, the sum of \$100.00 per month for a period of 24 months. Boomhower shall be required only to give his advice and counsel; except that he shall aid the business in any way he reasonably can from his new residence in Florida or elsewhere, and shall make personally such sales as he can for the account of the business, without any further payment to him as commission or otherwise on sales made to purchasers in Maryland, Virginia and the District of Columbia."

After quoting at page 16 of its brief part of the foregoing excerpt from the contract, appellant asserts that it was appellee's contractual undertaking and fiduciary duty upon election as vice-president and director, to aid and protect the business, and not do anything or permit anything to be done that would destroy its franchise and property.

At page 17 of its brief the appellant quotes from the corporate minutes of October 2, 1950, that upon motion duly made and carried the directors voted a salary to the appellee as vice-president and director of \$100.00 per month for his advice and counsel and for all services he should be able to render to the corporation, subject to the further order of the Board.

The contract aforesaid (Ex. 1) p. 2, paragraph 6c2 provides that appellant shall pay appellee "*On Account* of the property described in the inventory of furniture, fixtures, and tools and so forth, the sum of One Hundred (\$100.00) Dollars." (Emphasis ours.)

It is to be noted that the contract does not provide that such payment was to be made for the property, etc., but "on account" of the same.

At page 18 of appellant's brief it quotes the following endorsement on a check given to appellee for \$100.00 on October 3, 1950, "In full pursuant to paragraph 6-c of agreement between T. G. Benton or Boomhower, Inc., and D. W. Boomhower", which was, of course, in accordance with the contract provision not in full payment, but in full of the contract agreement to make the payment "on account".

By paragraph 6(b) of the contract (Ex. 1) aforesaid it was provided that: "Immediately prior to the closing hereof, the parties hereto or their representatives, shall take an inventory for the purpose of verifying the articles listed on the aforesaid inventories, making the same current as of September 30, 1950, copy of which shall be annexed hereto and made a part hereof" and by subparagraph "c" that:

"Immediately following the delivery of possession of the fully executed original of this bill of sale, and possession of all the aforesaid articles or within forty-eight hours thereafter (and if there be such delay this instrument shall not be operative until fully paid), Benton shall pay to Boomhower:

"1. On account of the property described in the inventory of stock in trade, a sum equal to the actual factory cost to Boomhower of the said property, or if lower, its marked down cost on Boomhower's books, and, as to stock whose present value is shown in ink on the above referred to inventory, the present value thereof. Boomhower, may, at his option, reserve from the sale the stock in trade whose present value is shown in ink to be less than his cost unless Benton is willing to pay the figure shown as Boomhower's cost or as shown by E. M. Raney.

"2. On account of the property described in the inventory of furniture, fixtures, tools, and so forth the sum of One Hundred (\$100.00) Dollars.

"If the total of the sums due Boomhower under Numbers 1 and 2 immediately above shall exceed \$15,000.00, Benton shall give to Boomhower his negotiable promissory note for the difference between \$15,000.00 and the total sums due under Numbers 1 and 2, payable six months from date with interest at the rate of 4 per cent. per annum."

It is obvious, therefore, that the payments of \$100.00 per month to the appellee were not salary, but were for the purchase of furniture and tools of the business.

3—The Appellee Was Not Responsible for the Alleged Attempted or So-Called Embezzlement of Appellant's Principal Franchise or for the Alleged Sabotaging of Its Employees, and Was Under No Obligation or Duty, Contractual or Fiduciary, to Report to Appellant Such Facts, If Any, as He May Have Known

A very careful examination of the contract between Benton and the appellee, Exhibit 1, discloses that there was no contractual obligation in that regard by the appellee, and as he was a "dummy" officer and director (supra p. 2) there was no fiduciary duty or obligation.

The Court's fifth finding of fact was:

"That the defendant took no part in Raney's efforts, if any were made, to cause the plaintiff to lose the H. G. Fischer & Co., distributorship,"

and the sixth finding of fact was:

"That the loss of the H. G. Fischer & Co., distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity." (App. p. 8).

These findings of fact are correct.

4—The Appellee Made No Misrepresentations

The appellant's brief asserts, in the second paragraph of its "statement of the case," that the complaint alleged that appellee misrepresented to appellant as an inducement to purchase the business, (1) that he had not, in theretofore conducting the business, contributed personally to the sales in the year preceding September 23, 1950, except in immaterial amounts, permitting plaintiff to believe that salesmen were responsible for the good sales in that year, (2) that the so-called "walk-in" business was substantial, (3) that the business could be successfully conducted with only \$2,000.00 to \$5,000.00 cash working capital, and (4) that Raney would remain as manager for three years in compliance with his contract, and that he was "the best in the business" (Brief pp. 2-3).

Dealing with these alleged misrepresentations in order, the first is that appellee had not contributed personally to the sales in the year preceding September 23, 1950.

Appellant asserts at p. 7 of its brief that appellee swore in his testimony, when called as a witness by the appellant, that that misrepresentation was correct, he was not active in the year preceding the sale, but he could not testify to the amount of sales he made personally (citing pp. 24-5 of the transcript), and the appellant further states appellee's denial, as a witness, that he materially contributed to sales in that year (citing p. 161 of the transcript), and further asserts that he testified falsely,

that his previous testimony in a deposition in the Municipal Court, on July 16, 1953, was that for the year preceding October 1, 1950, "I spent most of my time here that year—I was actively engaged in the business again" (citing p. 68 of the transcript), and that appellee further testified that if he was active he would show good sales, that what would be material sales would depend on how active he was in the business (citing pp. 168-9 of the transcript), but omitted to quote the statement of appellee at the same point that he could not give the percentage of what would be substantial. The appellant further asserts that the true facts are that appellee's bookkeeper, Brown, confirmed that he, the appellee, was very active in that year; that he was a fine and aggressive salesman, that he contributed potentially to the sales and was very forceful in culminating sales (citing pp. 196-8 of the transcript), where Brown, called as a witness by the appellant, in response to the question whether appellee made very considerable sales of products during that period, replied that he did not recall the exact volume, that was a long time ago, and the books will reflect to what extent he profited by his operation of the business, and in response to a question by the Court as to whether or not appellee, while on the job, contributed materially to the general picture of the sales organization, Brown said: "Well, he was a good all-around man and did his job well," and in response to a leading question by appellant's counsel, Brown said: When he was on the job "he was busy, we were busy." When further asked by appellant's counsel if in the last year when appellee was in business he contributed potentially to the sales business, Brown replied that "he always had his sales people talk things over with him, where he himself originated a sale he was very forceful in culminating it, and he was always available to help with other sales people."

Appellant's brief further argues (p. 8) that the uncontradicted evidence shows that for the year ending

September 30, 1950, appellee personally made sales amounting to \$29,529.54 (citing pp. 193-196 and 210-11 of the transcript) or 27% of the total sales of \$110,000.00 for that year with the firm profit on his sales of \$5,458.00 (Tr. 311, 38).

Brown, called as witness by the appellant, testified (Tr. 196-7) that he recalled that during the year in question appellee was very active but did not recall the exact volume of sales made by him. Churchill, another bookkeeper, called by appellant, testified (Tr. 211) that according to invoices before him the sales "imputed" to the appellee amounted to \$29,539.54, and according to the same figures the amount of profit indicated as a result of the sales was \$5,458.27; that by the word "imputed" he meant that he did not know anything more about it than what the invoices showed, and at page 212 said he could not say what was the total sales in that year, he hasn't any idea, and at page 213 that he does not know whether the slips before him reflect the truth. Sauer, an auditor formerly employed by the appellee and called by the appellant, testified that he had no records from which to show the gross amount of sales in the year in question (Tr. p. 215), that he could not state what the monthly sales were, because the books were kept on a calendar year basis (Tr. 217), that the gross sales for the year 1949 were \$130,650.00 and the net profit was \$7,054.00, after all expenses (Tr. 218), after taking out all operating expenses of every kind, character and description, this would go to the general assets of the business, except there was no salary attached to the operating expense and no deduction for commission to salesmen, appellee never charged the business anything for salesmen's commissions, salaries to bookkeepers and manager and commissions were out of the net profits (Tr. 219-21). Accordingly the statement of the appellant's brief at page 8 that the profit on sales personally made by appellee was 77 percent of the total net income in 1949 is not only

not substantiated, but is contradicted by the evidence produced by the appellant, as is the assertion at the same page of the brief that appellee's written representation in that regard was false and there is no support for the further assertion at the same page that if appellant had known that such representations were false and that the success of the business depended upon appellee's sales, appellant never would have purchased the business.

Appellant next asserts at page 8 of its brief that it did not learn of the falsity of such representation until after June, 1951, when Churchill, appellant's bookkeeper, called by appellant, compiled the true figures (citing p. 210 of the transcript), whereas in fact Churchill testified (Tr. 210-11) that he got up a written summary according to invoices and he did not know whether they reflected the truth (Tr. p. 213).

At the bottom of page 8 of its brief, appellant elaborates upon the necessary sales volume to produce the profit hereinbefore mentioned because salesmen were entitled to one-half the profit, yet as already pointed out this witness stated that the figure \$5,458.00 did not take into consideration any salesmen's commissions.

At page 9 of its brief appellant states that it relied upon the appellee's representation and understood that the earning power of the business was derived exclusively from sales made by salesmen (citing pp. 231-2 of the transcript), but there is nothing to support the assertion so made.

At page 13 of its brief appellant states that the appellee admitted that he represented his "walk-in" business to be substantial (citing p. 165 of the transcript), but fails to disclose that appellant had moved the business to another location (Tr. p. 165) three months after the sale occurred. Consequently, whether the "walk-in" business was substantial or not could not be shown.

With respect to the alleged misrepresentation that the business could be conducted with only \$2,000.00 to \$5,000.00 cash working capital, it is asserted at p. 12 of the brief that when appellee was asked whether he had misrepresented that the cash used in his business was \$3,500.00 he testified that his cash balance from time to time was \$1,139.00 to only \$3,000.00 and that he operated on that amount of cash, citing pp. 163-4 of the transcript, where he said that they had that discussion before—during the negotiations and his records show that he operated for three (3) years on from a little over \$300.00 up to \$3,000.00 bank balance and cash on hand, and asked if he actually showed Benton those books, replied that the books were all available, everything was available for Benton to investigate. The brief further states (p. 12) that appellee could not testify whether he made such representations “but it is alright. I could have made it because we did operate on that basis,” that he then admitted that lots of times he had \$10,000.00 or \$15,000.00 available and it is further said that appellant’s assertion that appellee made such misrepresentations is confirmed by appellee’s certification to appellant’s opening balance sheet showing cash on hand of \$4,500.00, citing transcript pp. 122-4, but there is no such certification. This is contradicted at p. 124 of the transcript. At page 120 of the transcript appellee stated that the books and records were supplied to Benton, all records except appellee’s personal ledger, and that Benton went over them very thoroughly, spending enough time to go through them, that Benton said that one of the things he wanted to do was to go over the books of account before he came to any decision about buying the business, and appellee informed his bookkeeper and equipment men to make everything available. Appellee further states (Tr. p. 123) that his records show that at the close of business in 1947, December 31st, he had approximately \$1,139.00 cash in bank and on hand, it ran \$2,600.00 or

\$2,700.00 in 1948, and around \$3,000.00 in 1949, he did inform Benton that he could, and he did, operate on that, lots of times he had \$10,000.00 to \$15,000.00 available. Appellee does not recall telling Benton that the \$4,500.00 he had placed in the company's cash working account was all sufficient, did not know how much money Benton was going to put in. But it is not clear what balancing the amount of cash Benton used in expenses in opening business has upon any issue in this case. It certainly does not imply, as the brief contends, that the sum he put in was sufficient for the operation of the business. The brief next asserts (p. 12) that relying upon such representation by appellee, appellant commenced business with \$4,500.00 cash over and above the price of the business, but within six or seven months found it essential to provide the business with additional cash totalling \$32,000.00, citing transcript p. 237—should be 232—so that it was necessary for appellant to put a total of approximately \$50,000.00 cash in the business, taking into account the \$18,500.00 capital investment, citing Churchill, p. 201, but that citation is not the testimony of Churchill but of Rickman, and neither of them supports the assertion made. Appellant concludes its third point with the statement: "Such experience is confirmation of the falsity of appellant's material representation." It is not apparent or explained what material representations or misrepresentations were made by appellee.

With respect to the alleged misrepresentation that Raney would remain as manager for three years in compliance with his contract and that he was "the best in the business" (Brief, p. 3, Appendix p. 2), the actual averment of the complaint says nothing about "as manager."

In stating the appellee's answer to the complaint, the brief omits all reference to the claim that "if the plaintiff incurred any loss in the business, it was due to the neglectful manner in which he operated same and also due

to the fact that he systematically milked the business and that he gave very little time to its operation" (App. p. 6).

It also omits all reference to the Court's finding of fact 6 that the loss of the H. G. Fischer & Co. distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity (App. p. 8).

Mathis' letter of August 18, 1953, written to Boomhower in reply to the latter's letter to Mathis of July 27, 1953 (Ex. 29) stated:

"The reason we withdrew our franchise from Boomhower, Inc., after Mr. Benton had purchased it from us was simply because he did not do enough business to justify a retention of the line. We were dissatisfied with his volume and withdrew our line from him in an effort to increase our sales in the Washington District. We withdrew our line from him in strict accordance with our contract, and so far as I know, Mr. Benton has no lawful or equitable complaint against us."

Although plaintiff put in evidence its Exhibits 20 and 7 it made no reference to the statement that "the attorney has declared himself another dividend as of March 15, 1951. He is bleeding this blind and I am of the opinion that all that purported wealth is a swell check kiting idea as every time anything goes up, he writes another check on the company account." Or in the statement in its Exhibit 7—letter from Raney to Mathis—that Benton and Kane feel that they could put one over on him, and that he did not propose to let Benton, in his sly, legal way to "chisel me" out of my just earnings on a technicality.

The brief asserts (p. 9) that appellee falsely denied on oath that he knew of Raney's arrangement with appellant, citing p. 53 of the transcript, where his state-

ment is that he knew that Raney had arrangements with Benton but did not know what they were, knew that there was a salary or drawing account, or what not, but that Benton took over the business and made his own arrangements.

The brief also asserts (p. 9) that appellee, by his prior testimony in another case showed that he had seen Raney's contract with appellant committing Raney to remain for three years, citing p. 70 of the transcript and Exhibit 2. What appellee did say at pp. 70-1 of the transcript was that he remembers that a contract existed between Benton and Raney, but whether there were any changes from it he did not know—at the time of his signature, recognizes Raney's signature, does not remember whether he saw it, but Raney discussed it with him, appellee may have seen it; does not deny that he ever saw it, it is hard to remember, knows that Benton had a contract with Raney, but does not know all the details of it, because it was between Benton and Raney, knows it was a profit sharing contract, that it was one-half of the profit.

Plaintiff's Exhibit 2, is a letter from Raney to Benton applying for the position as sales manager and agreeing to serve as such for three years in the best and most efficient manner and to give his full business time to the business and make all such sales as practicable to him personally with general recognition to the other salesmen employed, and attend to the business in all respects as would a manager, subject to the general direction of, and limitations imposed by, Benton or the Board of Directors.

It is next asserted (p. 10) that appellee's letter of August 27, 1950 (Ex. 3, Tr. 54-6), admitted his full knowledge of Raney's arrangement, but that letter as set out in the brief only stated that Raney agrees to remain on as manager, to receive one-half of the net profit, a drawing account of \$125.00 per week, against his half of

the net profit, any profit coming to him at the end of the year to be credited against his purchase of common stock in the new corporation. It does not say a word about the length of time Raney was to remain.

AUTHORITIES CITED BY APPELLANT

At page 14 of the brief appellant asserts that when the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake was committed by the trial Court, the judgment must be reversed even if there was some evidence to support the findings, citing *Bach v. Friden Machinery Co.*, 155 F. 2nd 361, which makes no such declaration; *Letcher County v. De Foe*, 151 F. 2nd 897, which applies the principle stated where the action of the trial Court was "clearly erroneous"; *Kuhn v. Princess Lida*, 119 F. 2nd 704, where the Court said:

"So long, therefore, as a finding of fact is supported by evidence, and is not clearly erroneous, it is to be accepted on appeal as verity";

and *Price v. Atlantic Coast Line*, 213 F. 2nd 9, where the Court said:

"We may not reverse the judgment unless the findings of fact are clearly erroneous."

We have no quarrel with this proposition even as stated by the appellant, but it is wholly inapposite to this case, since this Court cannot possibly find that a "clearly erroneous" mistake was committed by the trial Court. Indeed, FRCP 52(a) provides that:

"Findings of fact shall not be set aside unless clearly erroneous."

At page 15 appellant quotes from 17 Corpus Juris Sec., section 154, page 505, to the effect that any false representation of a material fact made with knowledge of its falsity and with intent that it shall be acted on by another

in entering into a contract, and which is so acted on, constitutes fraud and will entitle the party deceived thereby to avoid the contract. Appellant fails to show how this propoition of law is applicable to the present case, nor is it apparent.

At page 19 appellant cites *Hegstad v. Wysiecki*, 165 N.Y.S. 98, for the proposition that a "dummy" is commonly known as a "straw" man who holds title to real estate for another, but that case only applies to real estate under the New York Realty law. Applying the same principle, however, to the present case, supports the appellee's contention and the trial Court's holding that he was a "dummy" director, and, as we have seen, the contract between Benton and appellee required appellee to become a director "at the option of" Benton, and it was at his option that appellee was chosen.

At page 19 appellant also cites the case of *Van Schaick v. Aron*, 10 N.Y.S. 2nd 550, for the proposition that no word of honor or practice can make a corporate director a mere position of honor free of responsibility. In that case, the Court said:

"It would be subversive of a well recognized and sound public policy to permit directors of financial institutions whose activities are affected with a public interest to avoid liability by a claim that transactions were not what they purported to be. * * * The status of a director, in and of itself, does not impose liability. * * * No custom or practice can make a directorship a mere position of honor, free of all responsibility, or cause a name to become a substitute for care and attention. The personnel of a directorate may give confidence and attract custom."

Appellant next cites *Petition of Bender*, 15 N.Y.S. 2nd 4, reversed 17 N.Y.S. 2nd 1020, for the proposition that the office of director once assumed carries with it the duty of active and diligent service. This case recognizes "dummy" directors and the reversal was "to take proof

and report as to whether the third director was actually functioning as such or whether in fact there was a directorate consisting only" of two instead of three persons.

Also at page 19 appellant cites *Lifschutz v. Adams*, 20 N.Y.S. 2nd 839, as holding that directors concealing and ratifying fraudulent purposes with full knowledge thereof are accountable therefor. That was a stockholder's derivative action for accounting and damages, the complaint alleging that directors concealed the fact of, acquiesced in, and ratified conspiracy to defraud which occurred before they assumed office, and that they did not make details of fraudulent transactions known to stockholders. It was held that this was sufficient to state a cause of action.

Also at page 19, appellant cites *Bodell v. Gen. Gas & El. Corpn*, 15 Del. Ch., 119, as holding that directors must save the corporation from loss. That was a bill for injunction to restrain the issuance of shares of stock and it was said of directors that:

"While they are not trustees in the strict sense of the term, yet for convenience they have often been described as such."

At the bottom of page 19 and top of page 20 appellant cites authorities on the parol evidence rule, asserting that the appellee had made self-serving declarations, not admissible under the parol evidence rule. Appellant overlooks the fact in this connection, as in many others throughout its brief, that the only evidence is that produced by itself.

At page 42 appellant again cites *Bodell v. Gen. Gas & Elec. Corpn*, 15 Del. Ch., 119, as to the obligation of a trustee, overlooking the fact that there is no trustee involved here, and that in that same case the Delaware Court declared, as above pointed out, that "while

directors are not trustees in the strict sense of the term, yet they have often been described as such."

At page 42 appellant cites *Meinhardt v. Salmon*, 249 N.Y. 438, and *Pratt v. Shell Pet. Corp.*, 100 F. 2nd 833, as declaring that a trustee is held to something more than the morals of the market place, not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. The *Meinhardt* case was one of co-adventurers and joint-adventurers, not corporate directors, and in the *Pratt* case, the Court said:

"In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed must be clear, convincing and trustworthy."

At page 43 appellant cites the case of *Russell v. Post*, 138 U.S. 425, for the proposition that liability definitely attaches to one knowingly lending aid in any way to the perpetration of a fraud; but there is no evidence of that character in the instant case.

The appellant's final citation at page 42 is *Duane Jones Co. v. Burke*, 121 N.Y.S. 2nd 107, which has no application to the present case.

CONCLUSION

It is submitted that the findings of fact, conclusions of law and judgment of the trial Court were correct and should be affirmed.

Respectfully,

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BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

601

BOOMHOWER, INC.,

Appellant

VS.

D. W. BOOMHOWER,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

NOV 15 1956

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(i)

No. 13,518

**APPELLANT'S STATEMENT
OF QUESTIONS PRESENTED**

Appellant states that the questions presented are:

1. Whether the misrepresentations of facts admittedly made by appellee to appellant, in selling his business, were material misrepresentations of facts as a matter of law, which resulted in the loss to appellant? (The trial court failed to find what the admitted misrepresentations were, as required by Federal Rule 52, but they are proven by the uncontradicted evidence.)

2. Was appellee a director, vice president and fiduciary of appellant (or a mere "dummy"); and did appellee fail to discharge contractual and fiduciary duties to appellant to disclose to appellant timely his knowledge of attempted embezzlement of appellant's property by its vice president, and fail to aid the business in any way he could, with the resultant losses to appellant?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,518

BOOMHOWER, INC.,

Appellant

vs.

D. W. BOOMHOWER,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action by appellant as a Delaware corporation was commenced by personal service of process upon the individual defendant in the District of Columbia (a citizen of Florida), involves more than \$3,000, and seeks to recover damages (a) from misrepresentations by appellee of material facts in selling its business to appellant, and (b) from appellee's breach of fiduciary duties as a director and vice president of appellant. (Complaint, Tr. 435-438). Jurisdiction of the trial court is given by sections 11-305 and 11-306 of the District of Columbia

Code and by section 1332, Title 28 U. S. Code. Jurisdiction of this Court on appeal is vested by sections 1291, 1294, and 2106, Title 28 U. S. Code.

STATEMENT OF THE CASE

The complaint (Appendix 1) alleges that appellee sold appellant his medical equipment business in Washington, D. C. on September 23, 1950 for many thousands of dollars, including a valuable franchise for the distribution in Washington, D. C., Maryland and Virginia of the x-ray and diathermy machines manufactured by H. G. Fischer & Co.; that appellee covenanted that he would cause such franchise to be transferred to and enjoyed by appellant; that appellee who became appellant's vice president and director was morally bound to perpetuate appellant's enjoyment of that franchise; that appellee, knowing that a prime condition of appellant's purchase of the business was that one Raney (the existing manager) would remain with appellant for three years as manager, covenanted and agreed with appellant that Raney would comply with his contract; that in consideration of the appellee's undertakings appellant employed appellee as vice president and director at \$100 per month for two years upon condition that he personally should make such sales as he could for the business from his new residence in Florida, and to give his advice and counsel to appellant, but without obligation as to time devotion.

It charges that appellant, wholly inexperienced in such business, relied upon the representations and undertakings of appellee; that appellee misrepresented to appellant, as an inducement to purchase the business, (1) that he had not, in theretofore conducting the business, contributed personally to the sales in the year preceding September 23, 1950 except in immaterial amounts, permitting appellant to believe that salesmen were responsible for the good sales in that year, (2) that so-called "walk-in" business by purchasers who came to appellant's place of business, without the need of sales' effort, was very substantial,

(3) that the business could be successfully conducted with only \$2,000 to \$5,000 cash working capital, and (4) that Raney would remain as manager for three years in compliance with his contract, and that he was the "best in the business."

The complaint charges that as a direct result of such misrepresentations appellant suffered damages of \$18,000.

For a second cause of action, appellant alleges that as a result of the foregoing misrepresentations, and the failure of appellee in March or April, 1951 to timely inform appellant of facts known to him, as a vice president and director, appellant lost the aforesaid franchise to distribute the products of the Fischer & Co. and the services of Raney, with damages to appellant of \$25,000.

The Court allowed the prayer for judgment to be increased to \$32,000. (Tr. 14)

For its third cause of action appellant alleges that appellee failed to comply with his contract as vice president and director, and breached his fiduciary duties; that appellee is liable to appellant for the \$800 fees paid to him; and that appellant is excused from continuing to pay appellee the monthly fees.

Appellee's answer is in effect a general denial; and appellee interposed a counterclaim for \$1600.00, alleging that such sum was due as the balance of a \$2400 obligation created upon appellant's alleged purchase of furniture and tools from appellee. (App. 5-6). The court's judgment dismissed the complaint and appellee's counterclaim. (App. 9)

After trial, the Court entered its findings of facts and conclusions of law. Its conclusion of law is that

"from the findings of fact hereinabove set forth, the conclusion of law is that defendant made no material misrepresentations of facts"

which resulted in any loss to the plaintiff. The "findings of fact herein-above set forth" are barren of any findings pertinent ~~only~~^{mis} to the representations of facts. Such fact findings are pertinent only to the question whether appellee was a fiduciary of appellant. Hence the conclusion of law that no material misrepresentations were made is baseless of facts. (App. 9)

The only controversial fact findings relate to appellant's charge of appellee's breach of fiduciary duty. Those findings are that appellee was a mere "dummy" officer and director of appellant owing appellant no duty or fidelity; that by the contract of sale of the business appellee sold appellant "furniture and tools of the business for an additional sum of \$2500" (in contradiction of the clear and controlling terms of the written contract itself), and that the payments appellant was required to make to appellee of \$100 per month were not salary as an officer and director (again in contradiction of the clear and controlling terms of the written contract, and the conduct of appellee); and that plaintiff's loss of the Fischer franchise was not due to appellee's neglect of duty.

Upon filing of the court's memorandum to the Clerk, appellant moved for a new trial and rehearing, which was denied May 17, 1956. (Tr. 448)

Upon filing of the court's findings of facts and conclusions of law and judgment on May 28, 1956 appellant filed its "Motion for New Trial and Rehearing, for Amendment of Findings of Facts, Conclusions of Law and Judgement" (Tr. 460) which was denied June 26, 1956.

STATEMENT OF POINTS

1. The Court committed gross error in failing to find specially the material facts of the misrepresentations made by appellee in inducing appellant to purchase his business, in violation of Federal Rule 52; and such material facts show the clear error of the court's negative conclusion of law that "defendant made no material misrepresentations of facts which resulted in any loss to plaintiff", which the

court says follows "from the findings of facts hereinabove set forth" which facts are wholly irrelevant to that question; and, thus, the Court's conclusion of law is a baseless conclusion, unsupported by facts.

2. The Court committed gross error in its only finding of facts that appellee sold its "furniture and tools" to appellant for \$2500, that the payments of \$100 per month to appellee were on account of furniture and tools and not as salary, that appellee was a "dummy" officer and director of appellant, and that appellant's loss of the Fischer & Co. franchise was not a proximate cause of appellee's infidelity, — because such findings are contradictory of the only admissible evidence before the Court consisting primarily of the written contract between the parties and the conduct of appellee.

SUMMARY OF ARGUMENT

1. Appellee, in the written contract of sale of September 23, 1950 misrepresented "that he has not contributed to the sales of the business except in immaterial amounts during the past year", thus inducing appellant to believe that the earnings' ability of the business was the sales' power of paid salesmen, and that the business could be conducted successfully without an active proprietor, which was not true. (Par. 1, Pl's. Ex. 1)

2. Appellee misrepresented to appellant that his manager, Raney, was trustworthy, that he would comply with his contract, that he would remain as manager for three years, and that he was the best in the business.

3. Appellee misrepresented that the business could be conducted with only \$2,000 to \$5,000 cash working capital.

4. Appellee, in the written contract of sale, misrepresented that he would make such sales as he could for appellant's business

without any further payment to him, and further misrepresented that the "walk-in" business was substantial.

5. The trial court's conclusion of law that appellee made no material misrepresentations to appellant, without any findings of facts whatever on such subject, is therefore gross error.

6. The trial court grossly erred in its conclusion of law (mistakenly labelled as facts) that appellee was a "dummy" officer and director, and that the payments of \$100 per month to him were not salary (in violation of the parol evidence rule, and in contradiction of the actual facts, and without any admissible evidence to support it), and that appellant's loss was not due, also, to Raney's perfidy and appellee's failure to report to appellant his knowledge thereof timely.

7. The attempted embezzlement of appellant's principal franchise and the sabotaging of its employees by its vice president Raney from January to April, 1951, and appellee's knowledge thereof and breach of his contract and fiduciary duties in failing to report the facts to appellant and to stop Raney's perfidy, resulted in the ruination of appellant's business.

ARGUMENT

I. Appellee Falsely Represented In The Contract Of Sale That He Had Not Contributed To The Sales Of The Business In Material Amounts

Appellant, pursuant to contract with its organizer, T. G. Benton, and appellee of September 23, 1950 purchased on October 2, 1950 appellee's medical equipment business, paying many thousands of dollars therefor. Included in the sale was a valuable franchise covering the distribution in the District of Columbia, Maryland and Virginia of the x-ray and diathermy machines manufactured by the Fischer & Co. (Admissions of appellee in answer to paragraphs 1-3 of the complaint; contract, Pl's. Ex. 1).

Appellee's written representation in said contract that he had not contributed to the sales of the business in the year preceding September 23, 1950 except in immaterial amounts was false. (Par. 1, Pl's. Ex. 1) Appellee knew that it was false. He concealed the true facts from appellant. He knew that appellant was inexperienced in the business (Tr. 27-8) He knew that appellant would rely upon the same because appellant expected to conduct the business profitably from the sales made by paid salesmen. (Tr. 232; 231-2)

Appellee swore that his written representation was correct, that he was not active in the year preceding the sale, but he could not testify to the amount of sales he made personally. (Tr. 24-25) He denied on oath that he materially contributed to sales in that year. (Tr. 161) He testified falsely. His previous testimony in a deposition in the Municipal Court on July 16, 1953 was that for the year ending October 1, 1950 "I spent most of my time here that year" -- "I was actively engaged in the business again". (Tr. 68) He testified that "If I was active I would show good sales"; that what would be material sales would depend on how active I was in the business. (Tr. 168-9)

The true facts are: Appellee's bookkeeper, Brown, confirmed that appellee was very active in that year, that he was a fine and aggressive salesman, that he contributed potentially to the sales, and was very forceful in culminating sales. (Tr 196-8).

The uncontradicted evidence shows that appellee personally made sales amounting to \$29,529.54 (Churchill, Tr. 210-11, Brown, Tr. 193-196), or 27% of the total sales of \$110,000 for the year ended September 30, 1950, with the firm profit on his sales of \$5,458 (Tr. 211, 38). That compares with total net income of appellee's business in 1949 of \$7,054 on sales of \$130,650 (Sauer, Tr. 214, 218-20). In other words the profit on sales made personally by appellee was equal to 77% of the total net income from his business in 1949.

It follows conclusively that appellee's written representation was false, and in most material particulars. If appellant had known that such representation was false, and that the success of the business depended upon D. W. Boomhower's sales, appellant would never have purchased the business.

Appellant had believed such false representation, and did not learn that it was false until sometime after June, 1951 when Churchill, appellant's bookkeeper (now a C. P. A.) compiled the true figures. (Tr. 210)

The practical effect of the misrepresentation is: For appellant to have made a profit of \$5,458 on sales of \$110,000, appellant would have had to increase the expected sales volume to be contributed by salesmen to the extent of approximately \$60,000 because, on sales made by salesmen comparable to those made by appellee personally, the salesmen were entitled to one-half the profit. For instance, as the profit to appellee on \$30,000 of sales was \$5,400 without the payment of commissions, if half the profit had to be paid to salesmen it would have required \$60,000 of sales for the business to earn \$5,400.

Stated otherwise, as the sales personally made by appellee were \$30,000 (with net profit of \$5,458) out of total sales of \$110,000, the paid salesmen made sales of only \$80,000 for the year. And as appellee's total net income in 1949 was only \$7,054 on sales of \$130,650, it is apparent that the business earned no appreciable profit from sales made by salesmen.

Appellant relied upon appellee's representation, and understood that the earnings' power of the business was derived exclusively from sales made by paid salesmen (Tr. 231-2), and suffered substantial losses as a direct consequence of its inability to conduct the business profitably as appellee as the active proprietor had done, *infra*.

II. Appellee Misrepresented To Appellant The Trustworthiness Of Raney, His Manager, And Misrepresented That He Would Comply With His Contract And Remain As Manager For Three Years, And That He Was The Best In The Business, Whereas Appellee Knew That Raney Was A Dangerous Man And Willing To "Cut One's Throat".

Appellee had known his manager, Raney, who became appellant's vice president and manager on appellee's recommendation, since 1935 (Tr. 37-8). He knew that appellant had contracted for Raney's services for three years and that Raney was entitled to one-half of appellant's profits. He knew that appellant would not have purchased the business without such commitment by Raney, as appellee had recommended (Tr. 71); and he represented that Raney was an honorable fellow and the "best in the business" (Tr. 46-7, 51, 69); and he recommended Raney rather than anyone else (Tr. 69). He knew that Raney had agreed to remain as manager of appellant in the most efficient manner.

He falsely denied on oath that he knew of Raney's arrangement with appellant (Tr. 53). But he was impeached by his prior testimony in another case showing his express admission that he had seen Raney's

contract with appellant, (Tr. 70, Pl's. Ex. 2) committing him to remain for three years. Raney had contracted with appellant to serve appellant for three years as manager in the best and most efficient manner, knowing that appellant was purchasing the business on the strength of that commitment. He admitted that he knew Raney had a three year contract with appellant. (Tr. 74). He was confronted with his own letter to appellant of August 27, 1950 admitting his full knowledge of Raney's arrangement containing his proposal for the sale of the business, and stating:

"Ed Raney agrees to remain on as manager on the following - he is to receive one-half the net profit of the business, a drawing account of \$125 per week charged against his one-half of the net profit, any profit coming to Raney at the end of the year to be credited against his purchase of common stock in the new corporation." (Pl's. Ex. 3, Tr. 54-6)

And appellee was confronted with appellant's letter of August 29, 1950 to appellee explaining that Raney's interest in the profits would be dependent upon his remaining for three years, and stating that if such requirement were not agreeable to Raney for appellee to wire appellant immediately. (Pl's. Ex. 4). Immediately upon appellant's purchase of the business, appellee as vice president of appellant wrote the Fischer & Co. about appellant, stating,

"Ed Raney will remain in full charge * * * "

and that he is an outstanding man in the business. (Pl's. Ex. 8, Tr. 72) He testified and thereby admitted:

"I may have said that Raney said that he would remain for three years."

The proof in this action shows (a) that Raney, appellant's fiduciary (and partner) was engaged in the act of embezzling appellant's principal property right consisting of the exclusive franchise to sell the Fischer & Co. products in Washington, Maryland and Virginia, and in sabotaging

appellant's employees, in the fourth, sixth and seventh months of his employment, with large resulting losses to appellant, (b) that Raney was not an honorable fellow, and (c) that appellee actually knew of Raney's untrustworthiness, and falsified to appellant his trustworthiness. (Argument VII, ., infra)

Appellee, as appellant's vice president and director, knew from Raney's secret letter to him of April 1, 1951 that he was engaged in embezzling appellant's property (Pl's. Ex. 20), and he thereafter admitted to appellant's president that Raney "would cut your throat at any time", which statement appellee did not deny making in giving his deposition in another case involving one of the issues in this action (Tr. 138). But he denied making the admission in testifying in this action, in an obvious attempt to escape liability for his acts. Despite such knowledge of Raney's perfidy, and his admissions of knowledge of Raney's attempt to embezzle appellant's property, appellee had the audacity to testify in this action that Raney "is a very fine man." (Tr. 139) It proves his desperation to escape liability.

Appellee was anxious to sell his business at the particular time, and at the price at which he sold it, which explains his overreaching in misrepresenting the facts. (Tr. 29)

Appellant is not seeking to hold appellee responsible as a guarantor on the contract that Raney would remain for three years, as seemed to be the mistaken theory of the trial judge. Appellant seeks to hold him responsible, in damages, for his misrepresentations as herein detailed, including his misrepresentation of Raney's trustworthiness and that he would comply with his contract by remaining efficiently and honestly as manager for three years, as an inducement to appellant to purchase his business.

III. Appellee Misrepresented That The Business Could Be Conducted With Only \$2, 000 to \$5, 000 Cash Working Capital.

In examining appellee as to whether he had misrepresented that the maximum cash used in his business was \$3500, he testified that his cash balance from time to time was \$1139 to only \$3, 000, and that he operated on that amount of cash. (Tr. 163-4). He could not testify whether he made such representation,

"but it is all right. I could have made it because we did operate on that basis."

But he then admitted that "lots of time I had ten or fifteen thousands available." Appellant's assertion that appellee made such misrepresentation is confirmed by appellee's certification to appellant's opening balance sheet showing cash on hand of \$4, 500.00 (Tr. 122-124), thus implying that it was sufficient for the operation of the business.

Relying upon such representation by appellee, appellant commenced business with \$4, 500 of cash over and above the price paid for the business, but within six to seven months found it essential to provide the business with additional cash totalling \$32, 000 (Benton, Tr. 237); so that it was necessary for appellant to put a total of approximately \$50, 000 cash into the business, taking into account the \$18, 500 capital invested (Churchill, Tr. 201). Such experience is confirmation of the falsity of appellee's material representation.

IV. Appellee Misrepresented That He Would Make Sales Without Further Payment To Him, And That The "Walk-In" Business Was Substantial.

In paragraph 6 (e) of the contract of sale (Pl's. Ex. 1) appellee covenanted to aid the business in any way he reasonably could and to personally make such sales as he could for the business without further compensation.

Despite such written covenant, appellee falsely testified "I wasn't required to make sales" (Tr. 139-140), but that if he had made any sales "they certainly didn't amount to much." Appellee never made any sales for appellant. (Benton, Tr. 230)

Appellee admitted that he represented that his "walk-in" business was substantial, on which commissions were not paid to salesmen. (Tr. 164-5; 44) But his former bookkeeper testified that from October 1, 1950 through March 16, 1951 it amounted to only \$820.88, or at the rate of approximately \$1,700 per year (Tr. 198), compared with gross sales of \$130,650 for 1949 (Tr. 214, 218-220). Raney, appellant's vice president, and appellee's manager, testified that the "walk-in" business was not "very good." (Raney dep., p. 88).

The representation was of a material fact, and it was false.

The cumulative effect of the foregoing misrepresentations, and the betrayal of trust by appellant's successive vice presidents which resulted in the sabotaging of appellant's business (infra), was a net loss to appellant from operations of \$36,000 in the two year period October 2, 1950 to September 1, 1952. (Rickman, accountant, Tr. 199-202).

Plaintiff did not learn that the foregoing representations were not true until the discovery in April, 1951 of Raney's attempt to embezzle the Fischer franchise, and investigated the facts, and thereupon sought assiduously to sell the business and to reduce the losses, without success until September, 1952. (Benton, Tr. 233, 238, 241; Churchill 210-214.)

V. The Trial Court's Conclusion Of Law That Appellee Made No Material Representations To Appellant, Without Any Findings Of Facts Whatever On Such Subject, Is Gross Error

Judge Maguire's conclusion of law is:

"From the findings of facts hereinabove set forth, the conclusion of law is that the defendant made no material misrepresentation of fact"

which resulted in any loss to the plaintiff. And the findings of facts are barren of any such pertinent findings of fact! Hence, the conclusion of law is a baseless conclusion. It is a negative conclusion of law, without any basis of fact. The real facts as above shown compel the conclusion that material misrepresentations were made; and show that the conclusion of law is gross error.

The court's action is a clear violation of Rule 52 requiring that the court

"shall find the facts specially and state separately its conclusions of law."

The question whether admitted misrepresentations of facts constitute an actionable wrong is manifestly a question of law, as is the question whether a contract has been made, because it involves legal determinations; and when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake was committed by the trial court the judgment must be reversed even if there was some evidence to support the findings. Bach v. Friden Machinery Co. (6th Cir.), 155 F. 2d 362; Letcher Co. v. DaFoe (6th Cir.), 151 F. 2d 987; Kuhn v. Princess Lids, etc. (3rd) 119 F. 2d 704; Price v. Atlantic Coast Line (4th Cir.) 213 F. 2d 9.

As this court denied appellant's motion to remand the case for proper findings of facts (without opinion), appellant submits that it is proper and essential for this court to examine the record for errors of facts and law, in order that appellant will have a real hearing upon this appeal; otherwise appellant is remediless for the gross error of the trial court.

Appellant emphasizes that it is entitled to recover in this action its losses from the foregoing misrepresentations of facts, whether

or not appellee is responsible for the appellant's losses on the further ground that appellee breached its contract to aid appellee in any way he could and his fiduciary duties as hereinafter set forth, in failing to report his knowledge of the betrayal of trust by appellant's Vice President Raney.

Appellee's representations were false; they were of material facts; and appellant believed the representations as the inducing cause of its purchase of defendant's business. The law is simply stated in 17 Corpus Juris Sec., section 154, page 505:

"It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted on by another in entering into a contract, and which is so acted on, constitutes fraud and will entitle the party deceived thereby to avoid the contract. False representations, not sufficient to sustain an indictment for false pretenses, may be sufficient to vitiate a contract thereby obtained."

For the same reasons, an action at law for damages may be maintained.

VI. The Court Clearly Erred In Its Conclusions Of Law (Mistakenly Labelled As Facts) That Appellee Was A "Dummy" Officer And Director, And That The Payments of \$100 Per Month To Him Were Not Salary (In Violation Of The Parol Evidence Rule And In Contradiction Of The Real Facts And The Only Admissible Evidence.)

The Court mistakenly included in its findings of facts its conclusion of law that appellee was a mere "dummy" officer and director of appellant and did not owe appellant any fiduciary duty, — without any supporting facts. Such finding is one of law, just as is the question whether, on facts, a contract was made. Decisions, supra.

The basic, evidentiary facts upon which a proper conclusion depended, were not found. Such facts and evidence prove that the trial court's finding was merely its "hunch", — in contradiction of the

contract and the actions of the parties, the admissions of D. W. Boomhower, and in violation of the parol evidence rule.

In appellee's contract of sale of the business of September 23, 1950 (Pl's. Ex. 1, par. 3) he represented and covenanted that he was then the owner in good standing of the exclusive franchise to distribute in Washington, D. C., Virginia and Maryland the products of the H. G. Fischer & Co. (among others) and that he was privileged to and would cause to be transferred to appellant the said franchises on terms at least as favorable as the terms of the existing franchises.

Appellee agreed in the said contract to become a vice president and director of appellant, — that "Boomhower shall accept such post". Appellant agreed to cause to be paid to appellee "for his advice and counsel and/or his services, the sum of \$100 per month for a period of 24 months", for which appellee agreed to give his advice and counsel and to

"aid the business in any way he reasonably can from his new residence in Florida or elsewhere, and shall make personally such sales as he can for the account of the business, without any further payment to him as commission or otherwise on sales made to purchasers in Maryland, Virginia, and the District of Columbia." (Par. e, p. 3, Pl's. Ex. 1)

It was accordingly appellee's contractual undertaking, and his fiduciary duty upon election as vice president and director, to aid and protect the business, and not to do anything or permit anything to be done that would destroy appellant's enjoyment of its franchises and property. He failed to comply with that contract, and with his fiduciary duties.*

October 2, 1950 appellant, acting by appellee (D. W. Boomhower) and T. G. Benton as its two directors, elected appellee its first Vice President and Raney its other vice president and sales manager, the minutes of the meeting also showing:

* "He knew that the Fischer franchise was the most important asset of the business," (Benton, Tr. 229; Raney deposition, 69.)

"Upon motion duly made and carried the board of directors voted a salary to Mr. D. W. Boomhower as vice president and director of \$100 per month for his advice and counsel and for all services he should be able to render to the corporation, subject to further order of the board." (Page 2, Pl's. Ex. 40, Tr. 451-2, Motion to Correct Error in Record, Tr. 457-8)

He freely admitted that upon appellant's organization he became a director, vice president and stockholder. (Page 6, D. W. Boomhower deposition in Municipal Court case, Pl's. Ex. 21)

So that it was appellee, D. W. Boomhower, who elected himself a first vice president at a stated salary. He is estopped to deny that he was such director and vice president for pay, by reason of his own acts, and his own contract. He was no dummy.

The minutes of the same meeting also show that he, as one of the two directors of appellant, voted for the ratification by appellant of the contract of purchase of appellee's business and the assumption by appellant of the obligations of the contract (P. 2, of same minutes).

Appellee's several acts as a director and vice president as shown by writings prove that he regarded himself as a director, that he acted as such officer, and that appellant relied upon him as such officer for advice which he undertook to give in many instances. (Pl's. Exs. 24, 25, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38 and 39)

The minutes of the same directors' meeting show that appellee also subscribed to \$1,000 of the capital stock of appellant, and that as vice president he became a signing officer on bank checks of appellant.

October 6, 1950 appellee, as vice president of appellant, certified by letter to the H. G. Fischer & Co. to the formation of appellant corporation, and that the officers were

T. G. Benton, President

D. W. Boomhower, Vice President

and asked the Fischer & Co. to assure appellant of the continuation of the sales' franchise and its continued support and cooperation. And on the same date he wrote Fischer & Co. asking it to assure "us" (appellant) of the same dealer and cash discounts allowed under his former individual proprietorship. (Pl's. Exs. 8, 9) The Fischer & Co. replied to appellee as vice president of appellant October 12, 1950, expressing its purpose to extend to appellant all possible support and cooperation and extend to them the same discounts and terms as it had extended to appellee. (Pl's. Ex. 9 - two letters.). Such exclusive right to sell Fischer & Co.'s products in the Washington area was the property right that Vice President Raney sought to embezzle from January to April, 1951, which resulted in the ruination of appellant's business, and the knowledge of which appellee failed to report to appellant, and which appellee did nothing to prevent.

The Court declared (Tr. 105):

"From the facts so far, it would indicate that Mr. Boomhower was to be connected as vice president."

The same contract of sale of the business of September 23, 1950 expressly provided for the payment to appellee of prescribed prices for the stock in trade shown by the inventory thereof, and that appellant should also pay appellee

"2. On account of the property described in the inventory of furniture, fixtures and tools and so forth, the sum of One Hundred Dollars (\$100.00). (Pl's. Ex. 1, p. 2, par. 6.c.2.)

October 3, 1950 appellant gave appellee its check for \$100, marked:

"In full pursuant to paragraph 6 c of agreement between T. G. Benton or Boomhower, Inc. and D. W. Boomhower."

which check bears D. W. Boomhower's endorsement. (Pl's. Ex. 23)

The foregoing quotations from the contract of sale are the only provisions thereof relating to appellee's service as director and vice

president for salary, and to the sale of furniture and tools for \$100.

The basic facts shown above, and hereinafter, prove beyond doubt that appellee was not a "dummy" officer, and that he actually served as a director and vice president for pay and admitted such service.

A "dummy" is commonly known as a "straw" man who holds title to real estate for another. (Hegstad v. Wysiecki, 165 N. Y. S. 898). In this case appellee was a director and vice president in his own right for pay. No word of honor or practice can make a corporate directorship a mere position of honor free of responsibility. Van Schaick v. Aron, 10 N. Y. S. 2d 550, 170 Misc. 520. Once the office is assumed, it carries with it the burden of active and diligent service. Petition of Bender, 15 N. Y. S. 2d 4, 172 Misc. 674, reversed 17 N. Y. S. 2d 1020, 258 App. Div. 1041. Directors concealing and ratifying fraudulent purposes with full knowledge thereof, as appellee did in this case, are accountable therefor. Lifshutz v. Adams, 20 N. Y. S. 2d 839, 260 App. Div. 72. Bogart on "Trusts and Trustees", sec. 16, p. 88 says that directors are "agents with contractual obligations." The distinguishing feature of a de facto officer or director is that he is in fact occupying the office under color of right and performing its duties. McWhirter v. Washington Royalties Co., 17 Del. Ch. 243, 152 Atl. 220 (Del. Ch. 1930). Directors must save the corporation from loss. Bodell v. Gen. Gas & El. Corp., 15 Del. Ch. 119, 132 A. 442 (Del. Ch. 1926).

The trial court was misled by inadmissible parol evidence of self serving declarations by appellee. Parol evidence is inadmissible to contradict, vary, add to or subtract from the terms of a written contract. The parol evidence rule is really a matter of substantive law designed to protect a party to a written contract against perjury and infirmity. Jones on Evidence, Third Ed. sec. 434; Folgelson v.

Rockfay Construction Co., 300 N. Y. 334 (1950); Raleigh Associations v. Henry, 302 NY 467; Guinsburg v. Blustein, 202 N. Y. S. 333, 121 Mis. Rep. 784; Matter of Yager v. Ajic Chemical & Surgical Co., 122 Mis. 561, 204 N. Y. S. 471; Ross & Sensibaugh v. McClelland, 262 S. W. 205; Henderson v. Scott Oil & Ref. Co., Tex. Civ. App. 258 S. W. 1082, 1086.

The trial court's conclusion of law that Appellee was a "dummy" officer was not based on any admissible evidence.

The contract of sale and the minutes of the directors' meeting in which appellee participated are the controlling evidence that appellee became appellant's vice president and director for pay of \$100 per month, and that fact is corroborated by every act of appellee as such officer, including his many writings. The contract of sale is also the conclusive evidence that the furniture and tools were sold to appellant for \$100. There is no admissible evidence to support the trial court's finding that appellee was a "dummy" officer. There is no such thing as a "dummy" officer — director and vice president. One accepting such official position is either a de jure or de facto officer, and he is responsible for the duties of the office. If he fails to discharge such duties, he betrays his trust.

When appellant took appellee's deposition, appellee's counsel insisted that the contract of sale of September 23, 1950 "speaks for itself, and I submit that any evidence that tends to vary the terms of that contract is inadmissible." (Pl's. Ex. 21, D. W. Boomhower deposition in Municipal Court, p. 8, p. 18, the whole of which deposition appellee's counsel consented to be introduced, Tr. 67).

The trial judge struck the self serving declaration and volunteered statement of appellee that prior to the contract of sale of September 23, 1950 the parties had agreed on the price of the furniture and tools at \$2,500, immediately following his observation of the contract terms

providing otherwise, and upon objection by counsel for appellant based on the parol evidence rule (Tr. 101-3). In addition to the court's exclusion of such evidence for those reasons, such evidence would be clearly violative of the parol evidence rule. Moreover, such evidence is is parol evidence of alleged negotiations preceding the reduction of the agreement of the parties to writing, and it is merged in the contract of sale itself which contradicts conclusively that such was the agreement of the parties.

Similarly, appellee's counsel tried unsuccessfully to prove that the fixtures were sold for \$2,500 by appellee's letter of August 27, 1950 (written long before the contract of sale of September 23, 1950, which appellant had offered merely to show appellee's agreement that Raney would remain as manager for three years. (Pl's. Ex. 3, Tr. 104-5). The terms there set forth are a mere proposal to sell appellant the "fixtures and good will (not tools) for \$2,500." The Court promptly stated:

"I am not concerned with that." (Tr. 104)

And then the court properly said, in correcting appellee's counsel:

"From the facts so far, it would indicate that Mr. Boomhower was to be connected as vice president." (Tr. 105)

So that that letter was not taken as evidence of the price at which the furniture and fixtures or tools were sold in the contract of September 23, 1950. Any such proposal is merged in the final terms of the written contract — elemental law.

Then, at the conclusion of the trial, the trial judge reversed his position during the trial, and relied solely on a self serving, voluntary and isolated declaration by appellee, made seven months after the contract of September 23, 1950, for his conclusion that appellee was a dummy vice president and director. (Tr. 247, 249-251). It is appellee's letter of April 5, 1951 to appellant's president (Pls. Ex.

26) in reply to the latter's letter to him of April 2, 1951 (Pl's. Ex. 25). Appellee's letter of April 5, 1951 was written as a director and vice president of appellant, responding to appellant's request for business advices which appellee as a director and vice president undertook to give appellant in pursuance of his contractual obligation to aid appellant in any way he could as such officer. Coincidentally, appellee asked:

"Will you please check with your bookkeeper, I have not received my check for \$100.00 on the fixture set-up for February and March."

Appellant had introduced that letter for the sole purpose of showing that appellant was acting as vice president and director, as required by his contract, as late as April, 1951, and under no conceivable circumstances can the self-serving voluntary declaration by appellee change the fact that he was actually acting as a director and vice president.

The court ignored an equally cogent declaration by appellee in his letter to appellant of April 23, 1951 (Pl's. Ex. 28):

~~"In your letter you failed to advise me why I have not received my check for \$100 per month as per our agreement. This is for February, March and April."~~

"Our agreement" is solely and exclusively the contract of sale of September 23, 1950. Appellee thus admitted that such written agreement was controlling, and it is the only evidence before the court of the contract of the parties.

Appellee again contracted with appellant on May 11, 1951 and expressed his knowledge that the \$100 monthly payments were "on account of services" for February, March and April, 1951 (Pl's. Ex. 31, Tr. 116). The parties compromised appellant's claim that appellee owed appellant \$225 on another subject, by agreeing that appellee would pay one half of it, and thereupon appellee accepted from appellant \$300 "on account of services" for three months, less \$112.50. He received

a total of \$800 salary for 8 months, through May, 1951 (Tr. 99). Appellee is therefore estopped not only by the contract of September 23, 1950, and his action as a director at the directors' meeting of October 2, 1950, but by his contract of May 11, 1951, to assert that the \$100 per month was on account of furniture and tools or fixtures.

Appellee admitted that he was an officer of appellant, that he never resigned as such, but claimed that he had ceased to be such officer only because of a delay, for the above reasons, in receiving his \$100 per month. (Tr. 98, 129-130).

At the time of the settlement agreement of May 11, 1951, appellee as director and vice president of appellant, spent two weeks in appellant's place of business in Washington in May, 1951. He wrote Fischer & Co. to that effect on May 28, 1951 (Pl's. Exs. 11 and 30):

"I spent two weeks in Washington during the month of May, one of them in the store helping Thad Benton (Plaintiff's president) interviewing new salesmen and to reorganize his staff. His sales are holding up and they seem to have a lot of nice business on the fire. I believe they will produce some real business with this new set-up and there seems to be a lot of enthusiasm among the men to do this. While I was there, Thad hired Picker's top service man and he should bring them in plenty of business, he has been in the Washington territory for 8 years for Picker. One thing they need is a source of x-ray films and chemicals where they can buy and get delivery on large orders. May be you can help them on this. With the former Picker man with them, they should take a lot of this business from old Picker customers."

See also Tr. 98, 106, 126, Pl's. Ex. 33 showing appellant's letter of May 16, 1951 to D. W. Boomhower as vice president at its place of business and asking his advice and counsel, (Pl's. Exs. 21, 26, 32, 27, 34, 28, 38, Pl's. Ex. 21, D. W. Boomhower deposition in Municipal Court, p. 27, 37-38, 40), when, as appellee testified: "You (appellant's president) asked my help and I willingly offered it."

Such exhibits prove conclusively that appellee was acting as a director and vice president.

He testified that (at page 37):

"I remember advising you at the time that any action or any recommendation I made were on your behalf (appellant's)".

Whenever appellee was in Washington, he "always called on" appellant "and offered any help if I could be of any help. If Mr. Raney was there, I would see him." (D. W. Boomhower, Tr. 115.)

The foregoing is conclusive proof-positive that appellee was a director and vice president, and that he acted as such — not as a dummy —, and that any contrary finding is not based on any evidence.

VII. The Attempted Embezzlement of Appellant's Principal Franchise And The Sabotaging of Its Employees By Its Vice President Raney From January To April, 1951, And Appellee's Knowledge Thereof And Breach Of His Contract And Fiduciary Duties In Failing To Report The Facts To Appellant, And To Stop Raney's Perfidy, Resulted In The Ruination Of Appellant's Business.

Appellant's vice president-manager Raney enjoyed a written contract with appellant for three years of service to which Raney was committed and for service in the "best and most efficient manner", with a drawing account of \$125 per week and the right to one-half of appellant's net profits. He was required by contract to personally make sales the commissions upon which would equal his drawing account. The contract expressly recognized that appellant was purchasing the business "upon the strength of the belief" that he "will remain as sales manager" for three years (Pl's. Ex. 2; Raney deposition, p. 68). His position was so important that he approved on October 2, 1951 in writing appellant's contract of the purchase of the business from appellee. See additional facts, Argument II, supra, including appellee's assurance to appellant that Raney was an honorable, trustworthy fellow, and the best in the business, and proof that appellee knew such facts to be false. Appellee as appellant's director, voted to elect Raney a Vice President.

Raney thus became appellant's fiduciary, and partner, charged with the highest possible degree of honest devotion to his trust, all of which appellee well knew.

Raney knew that the Fischer franchise for Washington, Virginia and Maryland was appellant's principal asset. (Raney deposition, pp. 69-70). He had known Mathis, the president of Fischer & Co. for thirty years; they were friends; and he knew he could address him confidentially. (Raney deposition, p. 70)

In January, 1951 - the fourth month of his service to appellant - Raney, when in Chicago on appellant's business and at its expense, laid his plan to embezzle appellant's Fischer franchise. He then asked Mathis "about the possibility of taking over Fischer exclusively in this area", - Washington, Virginia and Maryland, for himself. (Raney's clandestine, confidential letter to Mathis (undated), written from his residence in Washington, second paragraph.) He assured Mathis that he had capital available to handle the deal "here" and that he "can carry on in exactly the same manner as we (appellant) have in the past." His letter concluded:

"Knowing you as I do, Allan, and your sense of loyalty I will ask a straight question. Will you let me have this territory exclusively on my own and take it away from this arrangement (with appellant) as of the present? Please advise me at my home address above." (Pl's. Ex. 5)

In the same letter, he expressed to Mathis his belief that appellant's organization would disintegrate, that two of appellant's Virginia salesmen "have had enough", and that one of his best men was dissatisfied which we shall show hereinafter was false.

Raney testified that it was Dennis Kane (appellant's important salesman) who had agreed to supply capital, that Kane "was involved in the whole picture" with him, but that Kane had later double crossed him by reporting Raney's purposes to appellant and "squealed" on him by revealing to appellant his purposes. (Raney deposition, pp. 75, 108-9)

So there was Raney, as vice president and manager, conniving with appellant's other principal employee Kane to embezzle appellant's principal asset; and, following Raney's subsequent resignation because his position had become wholly untenable, appellant was required to install Kane as Vice President and Manager, without any knowledge that he too had betrayed his trust (infra).

Mathis, Raney's 30-year old friend, replied to Raney's letter on March 27, 1951, addressed secretly to him at his residence rather than appellant's business address, agreeing that

"We, of course, are agreeable to turning over our representation to you"

stating that his territory would be Washington, Maryland and stated parts of Virginia and West Virginia. He stated that "we will be ready to proceed along the lines under discussion when we have heard further from you." (Pl's. Ex. 6)

The Fischer Co. did not make any independent investigation of Raney's unfavorable statements to him about appellant; and he knew how scarce competent men are in this business, and that if appellant lost Raney it would suffer. He knew that Raney was a Vice President and Fiduciary with a profit sharing contract, so that in encouraging Raney to his betrayal of trust he was equally guilty. (Mathis deposition, p. 50; Pl's. Ex. 8, Raney's Letter of April 5, 1951 to Mathis, attached to Pl's. Ex. 7 - last paragraph.)

Raney replied on March 31, 1951 addressed from his residence again, stating that he was then ready to "move" (to take on the Fischer franchise), that he could keep the Roanoke man (Mr. Lox, infra), and another of plaintiff's salesmen, Holah in the Richmond area, and then admitted his knowledge of his own perfidy:

"How much time will you require to notify Boomhower, Inc. — which is only fair — of the cancellation of their franchise? I certainly do not wish it to be said at any time that there was any "SCULLDUGGERY" in the transaction."

His conscience was hurting him. He knew he was engaged in dishonesty toward his employer-partner. He knew that he was, in effect, embezzling appellant's property rights, but gestured that the degree of guilt would be less if reasonable notice of such completed embezzlement were given appellant.

Raney then clandestinely wrote appellee from his residence on April 1, 1951 transmitting the Fischer Co. letter to him of March 27, 1951 showing that Raney had obtained Mathis' agreement to give him the franchise, and asking him for \$5,000 to finance his handling of the Fischer franchise in the Washington area. (Pl's. Ex. 20; appellee, Tr. 77-78) He stated that he could take with him appellant's employees, Lox of Roanoke, Holah, Kane and Cissel. He stated that he could obtain the capital from another source, but that the financier wanted 50% of the profits -- undoubtedly meaning Kane whom he admitted was "involved in the whole picture with him," but who had squealed on his purposes, supra.

Appellee had long before known of Raney's plans to embezzle the franchise. He freely testified by deposition in the Municipal Court action (admitted in evidence in this case by the pretrial order of the court, and appellee's consent during the trial, Pl's. Ex. 21, p. 43):

"I talked with Raney when I was up here and tried in every way -- (the sense of the testimony is that appellee meant that he was trying to deter Raney in his purposes)

"Q. When?

"A. Every time I was in Washington or every time he called me on the telephone.

"Q. How often did he call you?

"A. That is hard to say, I don't know."

As Raney's undated letter to Mathis (supra) shows conclusively that Raney planned in January, 1951 to embezzle the franchise, that testimony by appellee confirms that he knew long before April, 1951 of Raney's dishonest purposes. Appellee at all times concealed such knowledge from appellant, when it was his duty to report the facts and to do everything within his power to prevent the embezzlement and the sabotaging of appellant's employees.

Appellee, in breach of his contract and fiduciary duties, even sought to induce Raney to go to work for him at Sarasota, Florida, well knowing that appellant had purchased the business on the strength of assurance by appellee that Raney would remain as manager for three years. (Raney deposition, p. 107)

Having learned of Raney's purposes from Kane's squealing on him, but not knowing that Kane had been Raney's confederate in embezzling the business, appellant wrote appellee April 2, 1951, seeking to fortify its position, by asking how additional salesmen could be obtained, and in particular asked:

"I should also like to have the exclusive benefit of your judgment as to whether Mr. Raney is sufficiently capable as an executive to run the business, — bearing in mind his particular abilities in perhaps other directions. Kane is doing quite well as a salesman — Randy is developing; another salesman failed, and we are in need of help in Maryland and Virginia. Kindly give me as many worthwhile names or sources of information as possible. I shall be pleased to hold your data confidential if you like." (Ex. 25)

Upon receipt of that letter appellee knew from Raney's clandestine letter to him of April 1, 1951 that Raney had succeeded in his effort to embezzle appellant's franchise, subject only to his ability to finance it.

Despite such positive knowledge, appellee wrote appellant April 5, 1951 purporting to discharge his duty, as a director and vice president, to appellant, by making suggestions about obtaining new salesmen, BUT CONCEALING AND SECRETING HIS POSITIVE KNOWLEDGE, OBTAINED CLANDESTINELY FROM RANEY, OF RANEY'S DISHONEST PURPOSES, STATING ONLY:

"Regarding Ed Raney. I have full confidence in Ed's ability to manage and train men, he certainly is qualified for the medical equipment business and there is no reason, if he is happy in his work and satisfied with the returns from his effort, why he can't get the best out of the business for you. If I were still in that business, I would like nothing better than to have Ed with me." (Pl's. Ex. 26)

In the light of his definite knowledge of Raney's betrayal of his trust, such letter by appellee is an affirmative concealment of the very facts which it was appellee's contractual and fiduciary duty to report. His betrayal of his trust, and omission to comply with his contract, and with his fiduciary duties, makes him as liable as Raney himself. (Decisions, supra, and infra)

To compound his breach of trust and breach of contract to aid appellee in any way he could, and in an attempt to exculpate himself from liability for his wrongs, appellee testified falsely that "there was nothing in the correspondence from Ed that would be of any use to you anyway", and that his only correspondence with Raney was

"after he made his change and he went with Fischer." (Appellee's deposition in Municipal Court, p. 18)

Such testimony is proved to be false by Raney's letter to him of April 1, 1951 and his reply of April 5, supra, while Raney was in appellant's employ, because Raney did not go to work for Fischer & Co. until April 16, 1951 (Mathis deposition, p. 39; Raney's resignation mailed April 11, 1955, Pl's. Ex. 19). He resigned because his position had become wholly untenable.

Appellant's president, Benton, confronted Raney on April 4, 1951 with the general knowledge of his perfidy, but without knowing the details thereof as shown by the foregoing correspondence, but based on Kane's squealing on Raney. Raney first denied it, but when Benton put in a long distance phone call to the Fischer Co. Raney admitted his secret

correspondence but would not exhibit it. (Benton, Tr. 238-9, Raney dep. pp. 77, 106, 109).

Having learned from Kane of Raney's purposes, appellant wrote the Fischer Co. on April 5, 1951 (Pl's. Ex. 12). Appellant was fearful that Raney had sabotaged its business, and sought to assure the Fischer Co. by an optimistic letter that it would be successful in marketing the Fischer Co. products, and extolling its salesmen, including Kane, all in an effort to thwart Raney's purposes to embezzle the franchise. That letter followed a telephone call appellant made to Mathis that morning for the same purpose. The letter stated that appellant's showing would have been better if it had "sooner learned of some of the conditions that were not conducive to still better results" (meaning appellant's general knowledge of Raney's perfidy). It explained that appellant would expand its Virginia and Maryland business, stating that it had made such arrangements with Mr. Lox in Virginia.

By letter of April 5, 1951 (attached to Pl's. Ex. 7) Raney wrote Mathis, knowing that Kane had squealed on him, condemning Kane and claiming that Benton and Kane were trying to "put one over on him" (by stopping his dishonest purposes), and asking that Mathis again hold his correspondence in confidence and not to give the same to appellant. He had the audacity to suggest to Mathis that appellant was trying to "chisel" him out of his profit sharing arrangement, when he knew well that he had betrayed his trust and that there were no profits to be divided.

Appellant's letter of April 5, 1951, supra, to the Fischer Co. was abortive because of Raney's letter to Fischer of the same date, and because, as hereinafter shown more fully, Raney had sabotaged appellant's business and informed appellant's Virginia representatives, Messrs. Lox and Otteson, that appellant was going broke, that he could and would get the Virginia Fischer franchise and that they should go to work for him and not for appellant, — whereas Messrs. Lox and Otteson

forthwith went to Chicago and got the franchise for themselves and it was forthwith taken away from appellant by Fischer's letter of April 9, 1951 (Mathis deposition, pp. 20-22, 30-31, 34, 37). So that the immediate loss by appellant of the Fischer franchise in Virginia was the very direct result of Raney's breach of his duty in sabotaging appellant, in his communications to the Fischer Co. and Messrs. Lox and Otteson. Such loss to appellant occurred notwithstanding the fact that its relations with the Fischer Co. had been agreeable and satisfactory. (Mathis deposition, p. 45)

Appellant was in such desperate need of salesmen that it offered Raney a position as a salesman under a proposed new written contract dated April 7, 1951, because appellant could control him in that non-managerial capacity, but not as a vice president and manager. After Raney first signed the agreement, he cut-out his signature and did not accept the position. (Raney deposition, pp. 109-110, 116, 122; Pl's. Ex. 18; Benton, Tr. 237-8, 240.)

~~Despite appellant's prayerful letter to the Fischer Co. of April 5, 1951, Mathis by letter of April 9, 1951 (the same date of its letter to appellant taking away its Virginia franchise) informed Raney that if Raney took the Washington area franchise it would give appellant one month's notice of cancellation, and stating the territory that would be assigned to him exclusively "IN ACCORDANCE WITH THE CORRESPONDENCE BETWEEN US" (Letter, attached to Pl's. Ex. 7). But, by then, Kane had deserted Raney and had squealed on his purposes, appellee would not invest \$5,000 with him, and Raney was thwarted in his purpose to embezzle the franchise.~~

It is thus clear that it was Raney's dishonest purposes from January through April, 1951, in confederation with Kane, Kane's dishonest purposes, Raney's sabotaging of appellant's employees, and the enforced resignation of Raney, that directly lead to the disintegration of appellant, with the immediate loss of the Virginia franchise, the subsequent

need to employ Kane as Vice President and manager without knowledge of his perfidy, and the resulting loss of sales power and loss of the whole Fischer franchise, which ruined appellant's business, as hereinafter noted more fully.

And such perfidy in appellant's organization was known fully by appellee D.W. Boomhower, who affirmatively concealed it from appellant, in violation of his duty to disclose it, and to take steps timely to prevent it.

Following Raney's capitulation he was offered a position with Aloe & Co. in Washington, a competitor of appellant, which he accepted in violation of his contract with appellant not to enter a competing business in Washington, and he resigned from appellant April 11, 1951. (Raney, deposition p. 122, Pl's. Ex. 19)

Then, when Mathis was in Washington April 12 (obviously for the purpose of completing with Raney his embezzlement of the Washington area franchise), and finding that Raney had failed to obtain financing to take over the franchise, he offered Raney a position as assistant to the president at Chicago, which Raney accepted as of April 16, 1951. (Mathis deposition, pp. 38-39)

Raney's sabotaging of Appellant's Virginia representatives, and franchise

Mr. Howard Lox was in partnership in Virginia with Mr. Otteson; they were interested in obtaining in particular the franchise to sell the Fischer & Co. products as direct representatives; they dealt in such products in 1951 through appellant only (Lox, Tr. 81-84). Lox met Raney in Virginia in March, 1951 as vice president of appellant, when installing a Fischer machine Lox had sold (Tr. 88). Raney informed Lox that appellant "would not be in business very long because of finances" and that he would be able "to get the Fischer franchise for himself" and asked Lox and his partner Otteson to join him as salesmen

in Virginia. (Tr. 88) Lox testified that he and Otteson went to Chicago shortly thereafter and acquired the Fischer franchise for themselves. (Tr. 89) He testified that prior to such discussion with Raney he had had an agreement with appellant to go to work for it in a matter of a few weeks, but did not go to work for appellant after Raney talked with him. (Tr. 90-91)

It is thus manifest that Raney's breach of duty to appellant in revealing to Lox that the Fischer Virginia franchise could be taken lead directly to the loss to appellant of that franchise, and the services of Lox and Otteson.

Raney testified falsely that he had not asked Lox to go to work for him, and denied that appellant had arranged positively for Lox to work for appellant. Then, he recanted, and merely testified that he did not recall it. (Raney deposition, p. 66) But his clandestine letters to the Fischer Co. and to appellee declared that he could take with him the Roanoke man, Lox (Pl's. Exs. 20, 7) and it is thus manifest that he had had such discussions with Lox.

Particular Value of Fischer Franchise

The Fischer Co. advertised nationally, and sent leads received by it from such advertising to its distributors where the interested customers were located. These leads were of excellent help to the distributors, and when the Fischer Co. took the Virginia franchise from appellant it ceased to send those leads in Virginia to appellant. (Mathis, deposition, pp. 17-18, 21-22)

The trial court recognized fully Raney's perfidy, and betrayal of his trust, in stating:

"MR. HARDY: Your Honor, the activities of Mr. Raney and the condition of the business under him, and what happened to the business under his management is relevant here.

"THE COURT: I will accept it as a fact that Raney is every bit the villain he has been portrayed here by Mr. Benton. I will accept that, but accepting that, what has that got to do with Boomhower up to now?" (Tr. 235)

And at Tr. 236:

"THE COURT: * * I am assuming Raney was a villain of the deepest die, that he was everything Mr. Benton presumed to characterize him as, that he was guilty of dishonest purposes, that being the fact, if it is a fact, you can't tie up Boomhower with Raney, unless you have evidence to show so, so I am not concerned with Raney. I am concerned with Boomhower, and I have been concerned with Boomhower since this case started. I am concerned with both Boomhower and Boomhower, Inc.

"MR. HARDY: I think from what your honor has told me that you assume that Raney's activities did injure this business?

"THE COURT: I will assume that, but you can't leave it upon the shelf. You have got to bring it down and put it on the floor and put a lid on it."

The proof shows that Raney was an extremely dangerous person. It is inconceivable that appellee did not know of it, when he recommended him to be trustworthy, and when he admitted in May, 1951 to appellant that he would cut your throat.

In the case of Boomhower, Inc. v. American Automobile Insurance Co. in this court (now pending on motion for new trial, based on appellant's discovery of his clandestine correspondence with the Fischer Co.), being an action to recover under a fidelity bond for the acts of Raney and Kane, Raney testified falsely, but in this action he declared

that he had testified to the whole truth in that action (Raney deposition, pp. 71-72). Among other instances of his false testimony, are:

1. In the Insurance Co. case he denied emphatically that he had sought to acquire the Fischer franchise while a vice president of appellant, but that Fischer had voluntarily offered it to him (Tr. 288-9, 389-90). The testimony is absolutely false as shown by his correspondence with Mathis, supra, and his express admission in this case that it was he who first suggested that he wanted the Washington Fischer franchise, and he denied that he had testified contrarily in the American Automobile Insurance Co. case. (Raney, deposition, pp. 76-7)

2. In this action he denied emphatically that he ever saw the contract of sale between appellee and appellant of September 23, 1951 (Raney deposition, 84); and he made the same denial in the American Auto case (Tr. 102). His handwritten addenda to his contract of September 6, 1950 with appellant, dated October 2, 1950 shows that he expressly approved of such contract (Pl's. Ex. 2), which shows his testimony to be absolutely false.

3. In the American Auto case he denied that he requested Mathis to address him at his home (Tr. 277). The correspondence between him and Mathis, supra, shows the testimony to be absolutely false.

4. In the American Auto case he testified falsely that he had no written communications with Mathis between April 4, and 12, 1951 (Tr. 289). It is absolutely false as witness his correspondence early in April, 1951, supra.

5. He testified falsely in the American Auto case that his correspondence with Mathis did not concern appellant (Tr. 271-2, 276, 295-6), that it had relation to his going to work for the Fischer Co., and that there was nothing to conceal. His correspondence, supra, shows the testimony to be absolutely false; and he admitted in his deposition in this action that appellant knew nothing about it.

6. In the American Auto case he "certainly" denied under oath that he sought to raise capital and that he wrote D.W. Boomhower for capital to handle the Washington area franchise (Tr. 272-4, 350). His correspondence with Mathis and D.W. Boomhower, *supra*, show the testimony to be absolutely false. He falsely testified in the Auto case that he asked Boomhower for a loan because he did not have any idea what he was going to do (Tr. 376).

7. In the American Auto case Raney denied that he conspired with Kane to obtain the Fischer franchise (Tr. 400-1). In his deposition in this case he admitted that Kane would supply the capital and that he was involved in the whole picture, — meaning the purpose to embezzle the Fischer franchise (Raney deposition, 75).

**Further proof of Appellee's knowledge
of Raney's attempt to embezzle the
Fischer Franchise, and his conceal-
ment thereof from Appellant**

In addition to the proof of appellee's knowledge of Raney's perfidy, long before April, 1951, *supra*, appellee admitted in his testimony that Raney had informed him in March on long distance telephone that he wanted \$5,000 with which to take over the business (Tr. 113-4).

Appellee admitted in his testimony that he did not notify appellant of Raney's perfidy until May, 1951, when he came to Washington, and when he admitted to appellant that Raney would "cut one's throat any-time," *supra*.

Appellee admitted that his loyalty was not with appellant; that "I certainly didn't want to get in the middle between you and Raney" (Tr. 106, thus evidencing complete non-feasance to his employer, and entire willingness to protect his old friend). He admitted writing appellant April 5, 1951 in reply to appellant's letter of April 2 inquiring about Raney, and failed miserably to report his knowledge of Raney's infidelity that he knew so well by Raney's letter to him of

April 1, 1951 (Tr. 129). His alibi for disloyalty to appellant, and breach of his contract and fiduciary duties, he explained to be:

"The thing is, I started to say, in my correspondence with Raney I feel that it isn't fair, it wouldn't be fair with any men, anyone I had correspondence with that was personal correspondence, that I had to inform you (Benton) of every bit of correspondence we had." (Municipal Court deposition, p. 43.)

In other words, he testified in effect that he as a vice president and director of appellant could stand by and observe a co-vice president embezzle the employer's principal asset, without being fastened with the duty to take action — an astounding alibi, which confesses realistically his own perfidy.

The court recognized again appellee's infidelity (Tr. 190):

"MR. BENTON: Mr. Boomhower's (infidelity) in not doing his bounden duty by bringing that knowledge to this particular plaintiff that his employe was at that time doing these things.

"THE COURT: All right. I will assume that."

Appellant sought the aid of appellee in endeavoring to prevent the loss of the Fischer franchise, but appellee did nothing to aid appellant (Benton, Tr. 234). Although appellee knew Mathis for 15 years (Tr. 143), appellee was unable to give any satisfactory explanation of why he omitted to take steps with the Fischer Co. to prevent Raney's perfidy (Tr. 143).

Without knowledge of appellee's knowledge of Raney's perfidy, appellant wrote appellee April 13, 1951 informing him that Raney had resigned and that it wished to discuss that subject with him as soon as possible, and asked for advice in respect of obtaining new salesmen. (Pl's. Ex. 27) Appellee's reply of April 23, 1951 expressed sorrow that

"Ed Raney is no longer with your company. What happened? Ed sure knows the business and from the reports I have been getting here he was doing a good job on sales and the business was showing a nice increase." (Pl's. Ex. 28)

That is another instance of appellee's deliberate concealment of his knowledge of Raney's perfidy, obtained definitely from Raney's letter to him of April 1, 1951. Such concealment compounds appellee's guilt.

At appellee's meeting with appellant's president in Washington in May, 1951, in discussing Raney's perfidy, appellee freely declared that Raney would "cut your throat at any time." (supra) Yet, appellee wrote Mathis May 28, 1951 and, with loyalty to his old friend Raney stated to Mathis "I am happy to know Ed Raney is with you" — well knowing of the loss Raney's perfidy caused appellant (Pl's. Ex. 11). This is confirmatory of appellee's loyalty to Raney, and his disloyalty to appellant to which he was bound by contract and fiduciary ties.

Appellee in his letter to appellant of June 12, 1951 alleged that he misplaced his file of correspondence with Raney, and falsely stated twice that the correspondence was all after Raney left appellant's employ, and that "there was nothing in the correspondence from Ed that would be of any use to you any way, as it was all after he left your employ" (Pls. Ex. 38, supra).

Appellant's reply of June 19, 1951 (Pl's. Ex. 35) insisted that appellee should have brought his knowledge of Raney's perfidy to the attention of appellant immediately, and again demanded copies of the Raney correspondence; and stated that "deep principles compel follow-up, for reasons that should be apparent to you. So Don, please send on the correspondence to me as soon as possible, and I will thank you." Having received no reply, appellant again wrote appellee August 8, 1951 demanding copies of the correspondence, and stating that in view of developments appellant was compelled to suspend further payments to you of "the salary item." (Pl's. Ex. 36) February 9, 1952 appellant

again wrote appellee demanding the correspondence (Pl's. Ex. 37).

On June 16, 1953 when appellee's deposition was taken in the Municipal Court suit, he testified that he did not have the correspondence; that it disappeared, without explaining it satisfactorily (pp. 17-18). Appellant did not learn of Raney's letter to appellee of April 1, 1951 until it was produced at this trial; nor did it learn of Raney's correspondence with the Fischer Co. until Mathis' deposition in this action was taken at Chicago January 10, 1956 when Mathis produced it under subpoena.

The chain results of Raney's perfidy and Appellee's concealment thereof.

The direct losses resulting proximately from appellee's misrepresentations of facts inducing appellant to purchase the business, and from Raney's attempted embezzlement of the Fischer franchise, and his sabotaging of appellant's employees, and appellee's affirmative acts of concealment thereof, which prevented appellant from taking action timely to correct the abuses, were:

1. Loss of Raney's managerial services in April, 1951 and his failure to operate "in the best and most efficient manner" commencing in January, 1951, as required by his contract, and as known by appellee, and the complete disintegration of appellant's business (Benton, Tr. 239-240)
2. Loss in March, 1951 of its Virginia representatives Lox and Otteson, supra.
3. Loss in April, 1951 of the Fischer franchise for Virginia, and the leads to customers, supra, resulting directly from Raney's dishonest discussions with Lox in March, 1951 and his revelation to Lox that the Virginia franchise could be had, in violation of Raney's duty to appellant.

4. Losses from operations due to the foregoing, and from the need to engage Kane as Vice President and Manager (without knowing that he had been Raney's confederate and that he was guilty of betrayal of his trust, also), and who in July, 1951 was discovered by appellant (Tr. 239) to be dishonest, in appropriating \$50 cash of appellant to his own use, thus confirming to appellant his ineligibility with the result that his position was untenable and he resigned in July, 1951.

5. Appellant's inability to obtain competent managers and salesmen following Raney's sabotaging of the employees.

6. The resulting loss of sales power.

7. The inevitable loss of the whole remaining Fischer franchise early in 1952, following the inability to obtain managerial and sales force, when the franchise was given to Kane's company, District X-Ray Co. on RANEY'S RECOMMENDATION (to his confederate in crime, who had first agreed to finance Raney). (Mathis deposition, pp. 39-41, 60; Raney deposition.)

After resigning from appellant, Kane formed his own company in the fall of 1951 and sought to obtain the Fischer franchise (Mathis deposition, p. 40).

Plaintiff was thus forced to rely successively upon one Holah, and, later, one Cissel, to manage the business. Both were wholly unsuccessful. Plaintiff's sales suffered as a direct result of the loss of Raney and Kane, and as the further direct result thereof the Fischer Co. gave its Washington area franchise to Kane as of April, 1952, who had been seeking the franchise for sometime before then (Mathis deposition, pp. 40-42, 60). And the ruination of appellant's business was thereby confirmed.

It was the treacherous Raney — then Mathis' assistant — who was sent to Washington by the Fischer Co. and who recommended that appellant's franchise be terminated and be given to Kane — his former

confederate in the ruination of appellant's business (Raney deposition, p. 112; Mathis deposition, p. 56).

Plaintiff had sought assiduously to sell the business and minimize its loss, but was unsuccessful until September 1, 1952 when its business was sold to Kane's company, the District X-Ray Co., who had aided and abetted Raney's treachery (Benton, Tr. 241, Raney deposition, pp. 75-6, 109).

The resulting losses of appellant were:

Capital	\$18,500.00
Sums advanced by stockholders which appellant could never repay	18,092.75
	\$36,592.75

(Rickman, Accountant, Tr. 201-2) Those facts are uncontroverted, are controlling, and prove the loss of appellant.

The Law

Appellee was bound by contract to aid appellant in every way he could; and his fiduciary duty as a director and vice president imposed the same obligation on him to save appellant from loss. Bodell v. Gen. Gas & El. Corp., 15 Del. Ch. 119, 132 At. 442 (Del. Ch. 1926.)

"A trustee is held to something more than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." (Meinhard v. Salmon, 249 N.Y. 458, 468, 164 N.E. 545 (Judge Cardozo); Pratt v. Shell Pet. Corp., 100 F.2d 833.)

If two inferences may be drawn as to whether the conduct of the agent was to the damage of his principal, the inference that it was will be made. Ashman v. Miller, 101 Fed. 2d 85.

Liability definitely attaches to one knowingly lending his aid in any way to the perpetration of a fraud. Russell v. Post, 138 U.S. 425, 34 L. ed. 1009.

A director's culpable neglect gives rise to a corporation cause of action. Stevens on Corporations, sec. 147, p. 595, sec. 149, p. 595-597; and pages 599-600 where director failed to prevent misappropriation or misrepresentation.

In Duance Jones Co. v. Burke, 121 N.Y.S. 2d 107 it was held that where the advertising agency's original officers or employees conspired to form a new corporate advertising agency which immediately appropriated fully half of the original agency's customers and almost the entire trained working force of the agency, the officers or employees unjustly enriched themselves in breach of their fiduciary duty so as to be liable for damages - notwithstanding that the customers were not bound by contract to continue doing business with the original agency, and that the officers or employees had no contracts with the original agency for definite term and that they were free to quit the original agency and engage in competing activities. And, here, Raney was not free to quit; he was bound by a three-year contract; and Fischer Co. was not bound to continue its franchise indefinitely; but so long as appellant held it, it was a property right that Raney could not embezzle.

CONCLUSION

The appellee cannot conscientiously controvert the facts hereinabove set forth so fully with copious citations to the controlling evidence.

It is significant to observe that one of the cogent reasons for the error of the trial court throughout the case was the seeming inability to recognize dishonesty in Raney's attempt to embezzle the Fischer franchise - it being an intangible asset (Tr. 239-40); and his omission

to observe the real evidence of appellee's secret knowledge of Raney's perfidy and his complete failure to take steps to stop it.

We submit that appellee's misrepresentations of material facts were conclusively proved by the evidence, and that such misrepresentations and appellee's gross nonfeasance of contractual and fiduciary duty were the sole causes of the complete disintegration and failure of appellant's business; and that appellee must respond to appellant in damages for his wrongdoing.

Under Federal rule 54(c) the court is required to grant the relief to which the party is entitled, even if not perfectly pleaded or demanded in the prayer.

We most respectfully and confidently urge that the cause should be reversed, with directions to enter judgment for appellant for \$36,592.75.

THADDEUS G. BENTON
77 Park Avenue
New York, New York

RUSSELL HARDY, JR.
1012 - 14th Street, N. W.
Washington, D. C.

Attorneys for Appellant

(i)
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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

435 [Filed April 28, 1953]

BOOMHOWER, INC.

1 Tulip Lane)

Short Hills, New Jersey,)

Plaintiff)

vs.)

Civil Action No 1921-'53

D. W. BOOMHOWER)

State of Florida,)

Defendant)

COMPLAINT ON CONTRACT

(1) Plaintiff is a corporation incorporated under the laws of the State of Delaware and defendant is a resident and citizen of the State of Florida. The matter in controversy exceeds the sum of three thousand (\$3,000) dollars, exclusive of interest and costs.

(2) Pursuant to contract of September 23, 1950 between plaintiff and defendant, defendant on October 2, 1950 sold to plaintiff the business theretofore conducted by defendant consisting of the sale of medical equipment and supplies. Plaintiff paid defendant many thousands of dollars therefor.

(3) Included in the aforesaid sale was a valuable franchise covering the distribution and sale in the District of Columbia, Maryland and Virginia, exclusively, of the x-ray and diathermy machines manufactured by H. G. Fischer & Co. Defendant covenanted and agreed with plaintiff that he would cause such franchise to be transferred to and enjoyed by plaintiff, and, therefore, and because of plaintiff's employment of defendant as plaintiff's Vice-President and director, defendant was morally bound to do everything reasonably within his power to perpetuate in plaintiff's favor the said franchise.

436 (4) Defendant knew that one of the prime conditions precedent to plaintiff's purchase of the said business was that defendant's manager, one E. M. Raney, would remain with plaintiff for three years as the manager thereof; and defendant covenanted and agreed with plaintiff that Raney would comply with his contract with plaintiff for three years of service, with the terms of which defendant was familiar.

(5) As a consideration for the undertakings of defendant as aforesaid, plaintiff promised to employ defendant at the rate of \$100 per month for two years, for which defendant undertook to give plaintiff his advice and counsel and to aid plaintiff in any way he reasonably could and to "personally make such sales as he can for the account of the business, without any further payment to him as commission or otherwise"; and defendant warranted that the aforesaid Raney was bondable for fidelity purposes.

(6) Plaintiff was wholly inexperienced in the aforesaid business, and relied upon the representations and undertakings of defendant. Plaintiff is informed and believes, and thus alleges, that as an inducement to plaintiff to purchase the said business, and knowing well that plaintiff would not purchase the said business if the facts were not as represented, defendant misrepresented to plaintiff:

(a) that the said Raney would remain with the business for three years in compliance with his contract with plaintiff, and that Raney was the best in the business;

(b) that the business could be successfully conducted with the sum of \$2,000 to \$5,000 as cash working capital over and above the many thousands of dollars plaintiff was required to pay defendant for the said business, including the stock in trade.

(c) that defendant had not contributed to the sale of the business except in immaterial amounts during the year preceding September 23, 1950, permitting plaintiff to believe that the said Raney and other
437 salesmen were responsible for the good sales of the business in the said year.

(d) that the so-called "walk-in" business by purchasers of defendant's products who came to purchase from defendant at his place

of business, without the need of sales effort, was very substantial.

(7) As a direct result of the aforesaid misrepresentations plaintiff suffered losses and damages of approximately \$18,000.00.

WHEREFORE, plaintiff demands judgment of defendant in the sum of \$18,000.00, together with the costs of this action.

Second Cause of Action

(8) Plaintiff repeats the aforesaid allegations.

(9) As a result of the aforesaid misrepresentations, and the failure of defendant in or about March or April, 1951 to timely inform plaintiff of facts known to him as a Vice President and director of plaintiff, defendant lost the franchise from the H.G. Fischer & Co. partly in 1951 and wholly in 1952, and the aforesaid Raney breached his contract with plaintiff and terminated the name in April, 1951 and obtained employment with the H.G. Fischer & Co., which contributed to the loss by plaintiff of the said franchise from the H. G. Fischer & Co., to the loss and damage of plaintiff in the sum of \$25,000.

WHEREFORE plaintiff demands judgment of defendant in the sum of \$25,000 together with the costs of this action.

Third Cause of Action

(10) Plaintiff repeats all the aforesaid allegations.

(11) Plaintiff promised to pay defendant a salary of \$100 per month for 24 months for his services as Vice President and director of plaintiff as aforesaid, subject to defendant giving his advice and counsel to plaintiff, to his aiding plaintiff in any way he reasonably could, and to
438 his personally making such sales as he could for the account of the business, which defendant omitted and failed to perform as required by his aforesaid contract with plaintiff, including defendant's failure to immediately inform plaintiff of facts which, if timely known by plaintiff, would have prevented the loss to plaintiff of the franchise from the H.G. Fischer & Co.

(12) Plaintiff discharged its obligations to defendant, until plaintiff learned the facts above alleged consisting of defendant's misrepresentations as aforesaid, and the breach of defendant's undertakings,

when plaintiff suspended the said payments in about May, 1951 of \$100 per month to defendant. Defendant demands that there be paid to him by plaintiff the said salary for the period ending September 30, 1952. Plaintiff denies that defendant is entitled to any further payments, and alleges that defendant is liable to plaintiff for the payments heretofore made to defendant consisting of approximately \$800.00 by reason of the aforesaid misrepresentations to plaintiff and the failure of defendant to comply with his said undertakings.

WHEREFORE plaintiff prays the Court to enter its declaratory judgment herein that defendant is not entitled to any further payments from plaintiff, and plaintiff demands judgment of defendant for the said \$800.00 heretofore paid to defendant by plaintiff.

/s/ Robert S. Caviness
Attorney for Plaintiff

1625 K Street, N. W.
Washington, D. C.

439 [Filed September 3, 1953]

ANSWER TO COMPLAINT ON CONTRACT

Comes now defendant, D. W. Boomhower, and for answer to the complaint herein shows as follows:

First Defense

The complaint and each cause of action contained therein fails to state a claim against the defendant upon which relief can be granted.

Second Defense

1 & 2. Defendant admits allegations contained in paragraphs 1 and 2 of the complaint.

3. Defendant admits that portion of paragraph 3 of complaint which alleges that sale included transfer of franchise, but denies each and every other allegations contained therein.

4 & 5. Defendant denies the allegations contained in paragraphs 4 and 5 of the complaint, and further answering paragraph 5 defendant
440 states that the \$100.00 monthly payments referred to were payments on certain office furniture and fixtures sold by defendant to plaintiff and upon insistence of plaintiff agreed to accept monthly payments therefor.

6. Defendant is without knowledge or information sufficient to form a belief as to the truths of the allegations contained in paragraph 6 of the complaint.

6 (a) (b) (c) (d). Defendant denies the allegations contained in paragraphs 6 (a) (b) (c) (d) of the complaint.

7 & 8. Defendant is not required to answer paragraphs 7 and 8 of the complaint.

9. Defendant denies the allegations contained in paragraph 9 of the complaint.

10. Defendant is not required to answer paragraph 10 of the complaint.

11. Defendant denies that plaintiff promised to pay him \$100.00 per month for the reason alleged, the \$2400.00 was in payment for store fixtures and office furniture of the business which the plaintiff

insisted "be represented as salary to be earned", because said plaintiff wanted the financial statement of Boomhower, Inc., to "show up good" and not as a liability against the corporation. Further answering said paragraph defendant states that he always gave the plaintiff any and all advise he was called upon to give and he denies every other material allegation contained in said paragraph.

441 12. Defendant denies that plaintiff discharged his obligations to him or that he at any time made any misrepresentations to plaintiff. He denies that he owes the plaintiff \$800.00.

13. Further answer said complaint, defendant states that plaintiff is indebted to him in the sum of \$1600.00 for which amount there is a suit pending in the Municipal Court. Defendant further states that if the plaintiff incurred any loss in the operation of the business, it was due to the neglectful manner in which he operated same and also due to the fact that he systematically milked the business and gave very little time to its operation.

WHEREFORE, having fully answered said complaint, defendant prays that it be dismissed.

TURCO & BOWLES

By Joseph C. Turco

Attorneys for Defendant
217 Southern Building
Washington, D. C.

DEFENDANT DEMANDS A TRIAL BY JURY.

Copy of foregoing answer mailed to Robert S. Caviness, Esq., Attorney for Plaintiff, 1625 K Street, N.W., Washington, D. C., September 2, 1953.

/s/ Joseph C. Turco

Attorney for Defendant

447 [Filed May 7, 1956]

MEMORANDUM TO THE CLERK
Judgment for Defendant.

I. Relative to first so-called cause of action, the Court finds there were no material misrepresentations of fact made by defendant to Benton, the ostensible agent for the plaintiff corporation to be and which was subsequently formed.

II. As to so-called second cause of action, plaintiff has failed to maintain burden imposed upon it to prove the facts alleged by the preponderance of the evidence.

III. The third cause of action was dismissed by agreement of the parties.

Counsel will prepare tentative findings of fact and proper order.
Judgment accordingly.

/s/ **MATTHEW F. McGUIRE**
United States District Judge

May 7, 1956

454 [Filed May 28, 1956]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard during this term, upon the pleadings, testimony, and the argument of counsel, whereupon, the court this 28th day of May, 1956 enters the following:

FINDINGS OF FACT

1. That on or about September 23, 1950, defendant sold to one Thaddeus G. Benton, or a corporation to be formed, his medical supply business including the inventory of salable merchandise for \$13,387.62 cash, and the furniture and tools of the business for an additional sum of \$2500.00, payable \$100.00 cash and the balance is \$100.00 monthly installments.

2. That immediately after the sale Benton transferred the assets of his purchase to D.W. Boomhower, Inc., plaintiff corporation which he had formed, and among other things, caused the defendant to be named as a director and officer of the corporation.

3. That the defendant was a mere "dummy" officer and director of the plaintiff and owed the plaintiff no duty or fidelity.

4. That the payments made by the plaintiff to the defendant under the contract of purchase, Paragraph 6(e) were in fact payments for the purchase of furniture and not salary as an officer and director of the plaintiff.

455 5. That the defendant took no part in Raney's efforts, if any were made, to cause the plaintiff to lose the H. G. Fischer & Co., distributorship.

6. That the loss of the H.G. Fischer & Co., distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity.

7. That the third cause of action was dismissed by agreement of counsel.

CONCLUSIONS OF LAW

From the findings of fact hereinabove set forth, the conclusion of law is that the defendant made no material misrepresentation of fact to Benton which resulted in any loss to the plaintiff; that the plaintiff is not entitled to the relief prayed for and the complaint should and is hereby dismissed with the costs of these proceedings to be taxed upon the plaintiff.

/s/ Matthew F. McGuire

Judge

456 [Filed May 28, 1956]

JUDGMENT

This cause came on for final hearing at this term of court upon consideration of the pleadings, the evidence and testimony adduced in the cause, including that of the plaintiff, and the court finding as a fact that there were no material misrepresentations by the defendant as alleged in his first cause of action; that the plaintiff failed to maintain the burden imposed upon it to prove the facts alleged in its second cause of action; that the third cause of action and the counter claim with respect thereto was dismissed by agreement of counsel, and the court concluding as a matter of law that the plaintiff is not entitled to the relief prayed for in its complaint, it is by the court this 28th day of May, 1956 adjudged as follows:

That the plaintiff's complaint and the counterclaim be and the same are hereby dismissed, with costs of these proceedings to be taxed upon the plaintiff.

/s/ Matthew F. McGuire

Judge

Seen:

/s/ Russell Hardy, Jr., Esq.,

Attorney for Plaintiff.

459

[Filed June 6, 1956]

NOTICE IS HEREBY GIVEN that Boomhower, Inc., the plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment contained in the "Memorandum to the Clerk" by Hon. Matthew F. McGuire, United States District Judge dated May 7, 1956 (if that be the judgment and the entry thereof), from the order of the Court of May 17, 1956 denying plaintiff's motion for a new trial and a rehearing and for order permitting minutes of plaintiff's directors' meeting of October 2, 1950 to be marked as Exhibit No. 40, and from the findings of fact and conclusions of law, and judgment entered herein May 28, 1956.

Dated: June 5, 1956.

/s/ THADDEUS G. BENTON

**77 Park Avenue
New York, N.Y.**

RUSSELL HARDY, JR.

**1012 14th Street, N.W.
Washington, D.C.**

Attorneys for Plaintiff-Appellant.

BRIEF FOR THE APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC., a corporation, *Appellant*

v.

D. W. BOOMHOWER, *Appellee*

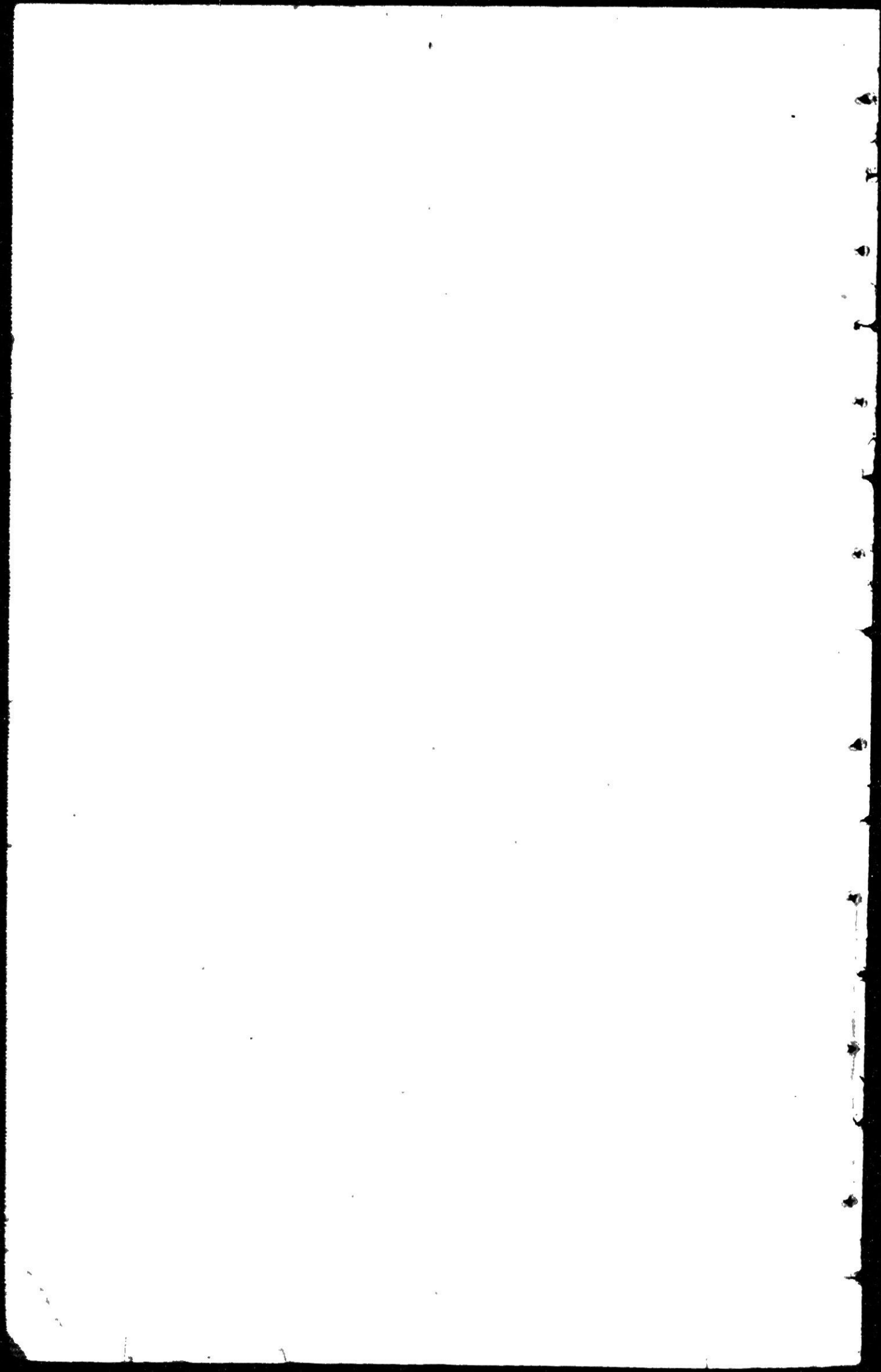
Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 11 1956

Joseph W. Stewart
CLERK

JOSEPH C. TURCO
Attorney for Appellee
217 Southern Building
Washington 5, D. C.



No. 13,518

APPELLEE'S STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee, the only question presented for the consideration of this Court is whether the appellee made misrepresentations or undertakings or concealment of breach of contract or fiduciary duties, the trial Judge having declared at the outset of the case that he was going to endeavor to establish either liability or non-liability and if there was no liability that was the end of the case (Tr. 15), and he found at the close of the plaintiff's case that there was no liability (App. 8-9).

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC., a corporation, *Appellant*

v.

D. W. BOOMHOWER, *Appellee*

BRIEF FOR THE APPELLEE

Appeal from the United States District Court for the
District of Columbia

COUNTER STATEMENT OF CASE

The appellant omits all reference to the fact that the case was decided at the trial at the close of plaintiff's evidence so that no evidence was presented by the appellee.

There was no evidence to support liability of the appellee, as the trial Judge found.

SUMMARY OF ARGUMENT

1. The appellee was a "dummy" officer and director.
2. The payments of \$100.00 per month to the appellee were not salary, but were for the purchase of furniture and tools of the business.
3. The appellee was not responsible for the alleged attempted or so-called embezzlement of appellant's principal franchise or for the alleged sabotaging of its employees, and was under no obligation or duty, contractual or fiduciary, to report to appellant such facts, if any, as he may have known.
4. The appellee made no misrepresentations.

ARGUMENT

1—The Appellee Was a "Dummy" Officer and Director

In the appellant's sixth point, beginning on page 15 of its brief, it argues to the contrary of this point. At page 16 of its brief it states that appellee agree in the contract (Ex. 1) to become a vice-president and director, and at page 17 it asserts that appellee elected himself as first vice-president. The fact of the matter is that by paragraph 6(e) of the contract (Ex. 1) it was provided that:

"Benton shall, at his option, cause Boomhower to be elected a vice-president and/or director of such corporation as he shall cause to be formed, and Boomhower shall accept such post, under such limitation of power as a vice-president as Benton shall impose."

Accordingly, when appellee was elected first vice-president and director it was by reason of the fact that Benton exercised such option and caused appellee to be so elected. This certainly made appellee a "dummy" officer and director as the trial Judge found.

2—The Payments of \$100.00 Per Month to the Appellee Were Not Salary But Were for the Purchase of Furniture and Tools of the Business

The Court's finding of fact No. 1 (App. p. 8) is:

"That on or about September 23, 1950, defendant sold to one Thaddeus G. Benton, or a corporation to be formed, his medical supply business, including the inventory of saleable merchandise for \$13,387.52 cash, and the furniture and tools of the business for an additional sum of \$2,500.00, payable \$100.00 cash and the balance in \$100.00 monthly installments."

The findings of fact No. 4 is:

"That the payments made by the plaintiff to the defendant under the contract of purchase, paragraph 6(e) were in fact payments for the purchase of furniture and not salary as an officer and director of the plaintiff" (App. p. 8).

The clause of the contract 6(e) referred to by the appellant at page 16 of its brief is that:

"Benton shall in any event cause to be paid to Boomhower for his advice and counsel and/or services, the sum of \$100.00 per month for a period of 24 months. Boomhower shall be required only to give his advice and counsel; except that he shall aid the business in any way he reasonably can from his new residence in Florida or elsewhere, and shall make personally such sales as he can for the account of the business, without any further payment to him as commission or otherwise on sales made to purchasers in Maryland, Virginia and the District of Columbia."

After quoting at page 16 of its brief part of the foregoing excerpt from the contract, appellant asserts that it was appellee's contractual undertaking and fiduciary duty upon election as vice-president and director, to aid and protect the business, and not do anything or permit anything to be done that would destroy its franchise and property.

At page 17 of its brief the appellant quotes from the corporate minutes of October 2, 1950, that upon motion duly made and carried the directors voted a salary to the appellee as vice-president and director of \$100.00 per month for his advice and counsel and for all services he should be able to render to the corporation, subject to the further order of the Board.

The contract aforesaid (Ex. 1) p. 2, paragraph 6c2 provides that appellant shall pay appellee "*On Account* of the property described in the inventory of furniture, fixtures, and tools and so forth, the sum of One Hundred (\$100.00) Dollars." (Emphasis ours.)

It is to be noted that the contract does not provide that such payment was to be made for the property, etc., but "on account" of the same.

At page 18 of appellant's brief it quotes the following endorsement on a check given to appellee for \$100.00 on October 3, 1950, "In full pursuant to paragraph 6-c of agreement between T. G. Benton or Boomhower, Inc., and D. W. Boomhower", which was, of course, in accordance with the contract provision not in full payment, but in full of the contract agreement to make the payment "on account".

By paragraph 6(b) of the contract (Ex. 1) aforesaid it was provided that: "Immediately prior to the closing hereof, the parties hereto or their representatives, shall take an inventory for the purpose of verifying the articles listed on the aforesaid inventories, making the same current as of September 30, 1950, copy of which shall be annexed hereto and made a part hereof" and by subparagraph "c" that:

"Immediately following the delivery of possession of the fully executed original of this bill of sale, and possession of all the aforesaid articles or within forty-eight hours thereafter (and if there be such delay this instrument shall not be operative until fully paid), Benton shall pay to Boomhower:

"1. On account of the property described in the inventory of stock in trade, a sum equal to the actual factory cost to Boomhower of the said property, or if lower, its marked down cost on Boomhower's books, and, as to stock whose present value is shown in ink on the above referred to inventory, the present value thereof. Boomhower, may, at his option, reserve from the sale the stock in trade whose present value is shown in ink to be less than his cost unless Benton is willing to pay the figure shown as Boomhower's cost or as shown by E. M. Raney.

"2. On account of the property described in the inventory of furniture, fixtures, tools, and so forth the sum of One Hundred (\$100.00) Dollars.

"If the total of the sums due Boomhower under Numbers 1 and 2 immediately above shall exceed \$15,000.00, Benton shall give to Boomhower his negotiable promissory note for the difference between \$15,000.00 and the total sums due under Numbers 1 and 2, payable six months from date with interest at the rate of 4 per cent. per annum."

It is obvious, therefore, that the payments of \$100.00 per month to the appellee were not salary, but were for the purchase of furniture and tools of the business.

3—The Appellee Was Not Responsible for the Alleged Attempted or So-Called Embezzlement of Appellant's Principal Franchise or for the Alleged Sabotaging of Its Employees, and Was Under No Obligation or Duty, Contractual or Fiduciary, to Report to Appellant Such Facts, If Any, as He May Have Known

A very careful examination of the contract between Benton and the appellee, Exhibit 1, discloses that there was no contractual obligation in that regard by the appellee, and as he was a "dummy" officer and director (supra p. 2) there was no fiduciary duty or obligation.

The Court's fifth finding of fact was:

"That the defendant took no part in Raney's efforts, if any were made, to cause the plaintiff to lose the H. G. Fischer & Co., distributorship,"

and the sixth finding of fact was:

"That the loss of the H. G. Fischer & Co., distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity." (App. p. 8).

These findings of fact are correct.

4—The Appellee Made No Misrepresentations

The appellant's brief asserts, in the second paragraph of its "statement of the case," that the complaint alleged that appellee misrepresented to appellant as an inducement to purchase the business, (1) that he had not, in theretofore conducting the business, contributed personally to the sales in the year preceding September 23, 1950, except in immaterial amounts, permitting plaintiff to believe that salesmen were responsible for the good sales in that year, (2) that the so-called "walk-in" business was substantial, (3) that the business could be successfully conducted with only \$2,000.00 to \$5,000.00 cash working capital, and (4) that Raney would remain as manager for three years in compliance with his contract, and that he was "the best in the business" (Brief pp. 2-3).

Dealing with these alleged misrepresentations in order, the first is that appellee had not contributed personally to the sales in the year preceding September 23, 1950.

Appellant asserts at p. 7 of its brief that appellee swore in his testimony, when called as a witness by the appellant, that that misrepresentation was correct, he was not active in the year preceding the sale, but he could not testify to the amount of sales he made personally (citing pp. 24-5 of the transcript), and the appellant further states appellee's denial, as a witness, that he materially contributed to sales in that year (citing p. 161 of the transcript), and further asserts that he testified falsely,

that his previous testimony in a deposition in the Municipal Court, on July 16, 1953, was that for the year preceding October 1, 1950, "I spent most of my time here that year—I was actively engaged in the business again" (citing p. 68 of the transcript), and that appellee further testified that if he was active he would show good sales, that what would be material sales would depend on how active he was in the business (citing pp. 168-9 of the transcript), but omitted to quote the statement of appellee at the same point that he could not give the percentage of what would be substantial. The appellant further asserts that the true facts are that appellee's bookkeeper, Brown, confirmed that he, the appellee, was very active in that year; that he was a fine and aggressive salesman, that he contributed potentially to the sales and was very forceful in culminating sales (citing pp. 196-8 of the transcript), where Brown, called as a witness by the appellant, in response to the question whether appellee made very considerable sales of products during that period, replied that he did not recall the exact volume, that was a long time ago, and the books will reflect to what extent he profited by his operation of the business, and in response to a question by the Court as to whether or not appellee, while on the job, contributed materially to the general picture of the sales organization, Brown said: "Well, he was a good all-around man and did his job well," and in response to a leading question by appellant's counsel, Brown said: When he was on the job "he was busy, we were busy." When further asked by appellant's counsel if in the last year when appellee was in business he contributed potentially to the sales business, Brown replied that "he always had his sales people talk things over with him, where he himself originated a sale he was very forceful in culminating it, and he was always available to help with other sales people."

Appellant's brief further argues (p. 8) that the uncontradicted evidence shows that for the year ending

September 30, 1950, appellee personally made sales amounting to \$29,529.54 (citing pp. 193-196 and 210-11 of the transcript) or 27% of the total sales of \$110,000.00 for that year with the firm profit on his sales of \$5,458.00 (Tr. 311, 38).

Brown, called as witness by the appellant, testified (Tr. 196-7) that he recalled that during the year in question appellee was very active but did not recall the exact volume of sales made by him. Churchill, another bookkeeper, called by appellant, testified (Tr. 211) that according to invoices before him the sales "imputed" to the appellee amounted to \$29,539.54, and according to the same figures the amount of profit indicated as a result of the sales was \$5,458.27; that by the word "imputed" he meant that he did not know anything more about it than what the invoices showed, and at page 212 said he could not say what was the total sales in that year, he hasn't any idea, and at page 213 that he does not know whether the slips before him reflect the truth. Sauer, an auditor formerly employed by the appellee and called by the appellant, testified that he had no records from which to show the gross amount of sales in the year in question (Tr. p. 215), that he could not state what the monthly sales were, because the books were kept on a calendar year basis (Tr. 217), that the gross sales for the year 1949 were \$130,650.00 and the net profit was \$7,054.00, after all expenses (Tr. 218), after taking out all operating expenses of every kind, character and description, this would go to the general assets of the business, except there was no salary attached to the operating expense and no deduction for commission to salesmen, appellee never charged the business anything for salesmen's commissions, salaries to bookkeepers and manager and commissions were out of the net profits (Tr. 219-21). Accordingly the statement of the appellant's brief at page 8 that the profit on sales personally made by appellee was 77 percent of the total net income in 1949 is not only

not substantiated, but is contradicted by the evidence produced by the appellant, as is the assertion at the same page of the brief that appellee's written representation in that regard was false and there is no support for the further assertion at the same page that if appellant had known that such representations were false and that the success of the business depended upon appellee's sales, appellant never would have purchased the business.

Appellant next asserts at page 8 of its brief that it did not learn of the falsity of such representation until after June, 1951, when Churchill, appellant's bookkeeper, called by appellant, compiled the true figures (citing p. 210 of the transcript), whereas in fact Churchill testified (Tr. 210-11) that he got up a written summary according to invoices and he did not know whether they reflected the truth (Tr. p. 213).

At the bottom of page 8 of its brief, appellant elaborates upon the necessary sales volume to produce the profit hereinbefore mentioned because salesmen were entitled to one-half the profit, yet as already pointed out this witness stated that the figure \$5,458.00 did not take into consideration any salesmen's commissions.

At page 9 of its brief appellant states that it relied upon the appellee's representation and understood that the earning power of the business was derived exclusively from sales made by salesmen (citing pp. 231-2 of the transcript), but there is nothing to support the assertion so made.

At page 13 of its brief appellant states that the appellee admitted that he represented his "walk-in" business to be substantial (citing p. 165 of the transcript), but fails to disclose that appellant had moved the business to another location (Tr. p. 165) three months after the sale occurred. Consequently, whether the "walk-in" business was substantial or not could not be shown.

With respect to the alleged misrepresentation that the business could be conducted with only \$2,000.00 to \$5,000.00 cash working capital, it is asserted at p. 12 of the brief that when appellee was asked whether he had misrepresented that the cash used in his business was \$3,500.00 he testified that his cash balance from time to time was \$1,139.00 to only \$3,000.00 and that he operated on that amount of cash, citing pp. 163-4 of the transcript, where he said that they had that discussion before—during the negotiations and his records show that he operated for three (3) years on from a little over \$300.00 up to \$3,000.00 bank balance and cash on hand, and asked if he actually showed Benton those books, replied that the books were all available, everything was available for Benton to investigate. The brief further states (p. 12) that appellee could not testify whether he made such representations “but it is alright. I could have made it because we did operate on that basis,” that he then admitted that lots of times he had \$10,000.00 or \$15,000.00 available and it is further said that appellant’s assertion that appellee made such misrepresentations is confirmed by appellee’s certification to appellant’s opening balance sheet showing cash on hand of \$4,500.00, citing transcript pp. 122-4, but there is no such certification. This is contradicted at p. 124 of the transcript. At page 120 of the transcript appellee stated that the books and records were supplied to Benton, all records except appellee’s personal ledger, and that Benton went over them very thoroughly, spending enough time to go through them, that Benton said that one of the things he wanted to do was to go over the books of account before he came to any decision about buying the business, and appellee informed his bookkeeper and equipment men to make everything available. Appellee further states (Tr. p. 123) that his records show that at the close of business in 1947, December 31st, he had approximately \$1,139.00 cash in bank and on hand, it ran \$2,600.00 or

\$2,700.00 in 1948, and around \$3,000.00 in 1949, he did inform Benton that he could, and he did, operate on that, lots of times he had \$10,000.00 to \$15,000.00 available. Appellee does not recall telling Benton that the \$4,500.00 he had placed in the company's cash working account was all sufficient, did not know how much money Benton was going to put in. But it is not clear what balancing the amount of cash Benton used in expenses in opening business has upon any issue in this case. It certainly does not imply, as the brief contends, that the sum he put in was sufficient for the operation of the business. The brief next asserts (p. 12) that relying upon such representation by appellee, appellant commenced business with \$4,500.00 cash over and above the price of the business, but within six or seven months found it essential to provide the business with additional cash totalling \$32,000.00, citing transcript p. 237—should be 232—so that it was necessary for appellant to put a total of approximately \$50,000.00 cash in the business, taking into account the \$18,500.00 capital investment, citing Churchill, p. 201, but that citation is not the testimony of Churchill but of Rickman, and neither of them supports the assertion made. Appellant concludes its third point with the statement: "Such experience is confirmation of the falsity of appellant's material representation." It is not apparent or explained what material representations or misrepresentations were made by appellee.

With respect to the alleged misrepresentation that Raney would remain as manager for three years in compliance with his contract and that he was "the best in the business" (Brief, p. 3, Appendix p. 2), the actual averment of the complaint says nothing about "as manager."

In stating the appellee's answer to the complaint, the brief omits all reference to the claim that "if the plaintiff incurred any loss in the business, it was due to the neglectful manner in which he operated same and also due

to the fact that he systematically milked the business and that he gave very little time to its operation" (App. p. 6).

It also omits all reference to the Court's finding of fact 6 that the loss of the H. G. Fischer & Co. distributorship was due solely to the plaintiff's failure to take care of the Fischer Company's customers and a drop in the volume of their business and not to the defendant's neglect of duty or lack of fidelity (App. p. 8).

Mathis' letter of August 18, 1953, written to Boomhower in reply to the latter's letter to Mathis of July 27, 1953 (Ex. 29) stated:

"The reason we withdrew our franchise from Boomhower, Inc., after Mr. Benton had purchased it from us was simply because he did not do enough business to justify a retention of the line. We were dissatisfied with his volume and withdrew our line from him in an effort to increase our sales in the Washington District. We withdrew our line from him in strict accordance with our contract, and so far as I know, Mr. Benton has no lawful or equitable complaint against us."

Although plaintiff put in evidence its Exhibits 20 and 7 it made no reference to the statement that "the attorney has declared himself another dividend as of March 15, 1951. He is bleeding this blind and I am of the opinion that all that purported wealth is a swell check kiting idea as every time anything goes up, he writes another check on the company account." Or in the statement in its Exhibit 7—letter from Raney to Mathis—that Benton and Kane feel that they could put one over on him, and that he did not propose to let Benton, in his sly, legal way to "chisel me" out of my just earnings on a technicality.

The brief asserts (p. 9) that appellee falsely denied on oath that he knew of Raney's arrangement with appellant, citing p. 53 of the transcript, where his state-

ment is that he knew that Raney had arrangements with Benton but did not know what they were, knew that there was a salary or drawing account, or what not, but that Benton took over the business and made his own arrangements.

The brief also asserts (p. 9) that appellee, by his prior testimony in another case showed that he had seen Raney's contract with appellant committing Raney to remain for three years, citing p. 70 of the transcript and Exhibit 2. What appellee did say at pp. 70-1 of the transcript was that he remembers that a contract existed between Benton and Raney, but whether there were any changes from it he did not know—at the time of his signature, recognizes Raney's signature, does not remember whether he saw it, but Raney discussed it with him, appellee may have seen it; does not deny that he ever saw it, it is hard to remember, knows that Benton had a contract with Raney, but does not know all the details of it, because it was between Benton and Raney, knows it was a profit sharing contract, that it was one-half of the profit.

Plaintiff's Exhibit 2, is a letter from Raney to Benton applying for the position as sales manager and agreeing to serve as such for three years in the best and most efficient manner and to give his full business time to the business and make all such sales as practicable to him personally with general recognition to the other salesmen employed, and attend to the business in all respects as would a manager, subject to the general direction of, and limitations imposed by, Benton or the Board of Directors.

It is next asserted (p. 10) that appellee's letter of August 27, 1950 (Ex. 3, Tr. 54-6), admitted his full knowledge of Raney's arrangement, but that letter as set out in the brief only stated that Raney agrees to remain on as manager, to receive one-half of the net profit, a drawing account of \$125.00 per week, against his half of

the net profit, any profit coming to him at the end of the year to be credited against his purchase of common stock in the new corporation. It does not say a word about the length of time Raney was to remain.

AUTHORITIES CITED BY APPELLANT

At page 14 of the brief appellant asserts that when the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake was committed by the trial Court, the judgment must be reversed even if there was some evidence to support the findings, citing *Bach v. Friden Machinery Co.*, 155 F. 2nd 361, which makes no such declaration; *Letcher County v. De Foe*, 151 F. 2nd 897, which applies the principle stated where the action of the trial Court was "clearly erroneous"; *Kuhn v. Princess Lida*, 119 F. 2nd 704, where the Court said:

"So long, therefore, as a finding of fact is supported by evidence, and is not clearly erroneous, it is to be accepted on appeal as verity";

and *Price v. Atlantic Coast Line*, 213 F. 2nd 9, where the Court said:

"We may not reverse the judgment unless the findings of fact are clearly erroneous."

We have no quarrel with this proposition even as stated by the appellant, but it is wholly inapposite to this case, since this Court cannot possibly find that a "clearly erroneous" mistake was committed by the trial Court. Indeed, FRCP 52(a) provides that:

"Findings of fact shall not be set aside unless clearly erroneous."

At page 15 appellant quotes from 17 Corpus Juris Sec., section 154, page 505, to the effect that any false representation of a material fact made with knowledge of its falsity and with intent that it shall be acted on by another

in entering into a contract, and which is so acted on, constitutes fraud and will entitle the party deceived thereby to avoid the contract. Appellant fails to show how this proposition of law is applicable to the present case, nor is it apparent.

At page 19 appellant cites *Hegstad v. Wysiecki*, 165 N.Y.S. 98, for the proposition that a "dummy" is commonly known as a "straw" man who holds title to real estate for another, but that case only applies to real estate under the New York Realty law. Applying the same principle, however, to the present case, supports the appellee's contention and the trial Court's holding that he was a "dummy" director, and, as we have seen, the contract between Benton and appellee required appellee to become a director "at the option of" Benton, and it was at his option that appellee was chosen.

At page 19 appellant also cites the case of *Van Schaick v. Aron*, 10 N.Y.S. 2nd 550, for the proposition that no word of honor or practice can make a corporate director a mere position of honor free of responsibility. In that case, the Court said:

"It would be subversive of a well recognized and sound public policy to permit directors of financial institutions whose activities are affected with a public interest to avoid liability by a claim that transactions were not what they purported to be. * * * The status of a director, in and of itself, does not impose liability. * * * No custom or practice can make a directorship a mere position of honor, free of all responsibility, or cause a name to become a substitute for care and attention. The personnel of a directorate may give confidence and attract custom."

Appellant next cites *Petition of Bender*, 15 N.Y.S. 2nd 4, reversed 17 N.Y.S. 2nd 1020, for the proposition that the office of director once assumed carries with it the duty of active and diligent service. This case recognizes "dummy" directors and the reversal was "to take proof

and report as to whether the third director was actually functioning as such or whether in fact there was a directorate consisting only" of two instead of three persons.

Also at page 19 appellant cites *Lifschutz v. Adams*, 20 N.Y.S. 2nd 839, as holding that directors concealing and ratifying fraudulent purposes with full knowledge thereof are accountable therefor. That was a stockholder's derivative action for accounting and damages, the complaint alleging that directors concealed the fact of, acquiesced in, and ratified conspiracy to defraud which occurred before they assumed office, and that they did not make details of fraudulent transactions known to stockholders. It was held that this was sufficient to state a cause of action.

Also at page 19, appellant cites *Bodell v. Gen. Gas & El. Corp.*, 15 Del. Ch., 119, as holding that directors must save the corporation from loss. That was a bill for injunction to restrain the issuance of shares of stock and it was said of directors that:

"While they are not trustees in the strict sense of the term, yet for convenience they have often been described as such."

At the bottom of page 19 and top of page 20 appellant cites authorities on the parol evidence rule, asserting that the appellee had made self-serving declarations, not admissible under the parol evidence rule. Appellant overlooks the fact in this connection, as in many others throughout its brief, that the only evidence is that produced by itself.

At page 42 appellant again cites *Bodell v. Gen. Gas & Elec. Corp.*, 15 Del. Ch., 119, as to the obligation of a trustee, overlooking the fact that there is no trustee involved here, and that in that same case the Delaware Court declared, as above pointed out, that "while

directors are not trustees in the strict sense of the term, yet they have often been described as such."

At page 42 appellant cites *Meinhardt v. Salmon*, 249 N.Y. 438, and *Pratt v. Shell Pet. Corp.*, 100 F. 2d 833, as declaring that a trustee is held to something more than the morals of the market place, not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. The *Meinhardt* case was one of co-adventurers and joint-adventurers, not corporate directors, and in the *Pratt* case, the Court said:

"In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed must be clear, convincing and trustworthy."

At page 43 appellant cites the case of *Russell v. Post*, 138 U.S. 425, for the proposition that liability definitely attaches to one knowingly lending aid in any way to the perpetration of a fraud; but there is no evidence of that character in the instant case.

The appellant's final citation at page 42 is *Duance Jones Co. v. Burke*, 121 N.Y.S. 2d 107, which has no application to the present case.

CONCLUSION

It is submitted that the findings of fact, conclusions of law and judgment of the trial Court were correct and should be affirmed.

Respectfully,

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PETITION OF APPELLANT FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,518

BOOMHOWER, INC.,

Appellant

v.

D. W. BOOMHOWER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

MAY - 3 1957

Froyd W. Stewart

CLERK

UNITED STATES COURT OF APPEALS

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No. 13,518

BOOMHOWER, INC.,

Appellant

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**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PETITION OF APPELLANT FOR REHEARING

The appellant respectfully petitions the court for the rehearing of the appeal herein, and for the reversal of the judgment of the District Court, and respectfully shows as grounds therefor:

1. The Court erred in assuming that the appellant's principal contention is merely that "the District Court's findings are not supported by the evidence," and in holding that "We find no basis for this contention."

2. Appellant's principal contention, in summary, was that the District Court committed gross error, and that the clear preponderance of the only admissible evidence proves beyond doubt that,

(a) Appellee's misrepresentations of facts (the existence of which are implicit in the District Court's conclusion) were material misrepresentations of facts as matter of law (the legal conclusion upon which this court did not rule because the District Court did not find what such misrepresentations were, the result of which is that nowhere in the record of this case is there any finding of what the misrepresentations of facts were, in violation of Civil Rule 52 requiring the facts to be found specially); and

(b) Appellee, as an actual director and Vice President of appellant, and as the vendor to appellant of his business, breached his contractual undertaking to "aid the business in any way" he could, and breached his fiduciary duty to reveal to appellant his knowledge of wrongdoing by his co-Vice President, Raney, that lead directly to the destruction of appellant's business. (Nowhere in this record is there any finding of fact on such subject, except the erroneous, legal conclusion, supportable by fact and evidence, that appellee was a "dummy" officer and director. Any evidence of fact that could support such legal conclusion is clearly barred by the parol evidence rule, - one of substantive law.

3. Even if there was some slight evidence (inadmissible as it was) to support the legal conclusions of the trial court (mistakenly labelled as facts), when the admitted misrepresentations of facts are so patently material and constitute an actionable wrong, it is the duty of the reviewing court to reverse the judgment. (See decisions, p. 14, appellant's main brief.)

4. The conclusions of the trial court (conclusions of fact and law, rather than findings of facts specially) are clearly erroneous, although there may be some scintilla of evidence from which the trial court might draw its conclusions; but, as the entire evidence, when actually analyzed, leaves "the definite and firm conviction that a

mistake has been committed", it is the duty of the reviewing court to reverse the judgment. U. S. v. U. S. Gypsum Co., 333 U. S. 364, 92 L. ed. 743 (1948).

5. The court's conclusion, in the negative words "We find no basis for" the principal contention of appellant "that the District Court's findings are not supported by the evidence" is not equivalent to a conclusion that the preponderance of the admissible evidence supports the conclusion of the trial court; and, if it were, it would fail to show in this record what those facts are. This record is barren of any fact findings material to the issue; and if the correct fact findings supported by the only admissible evidence were made, counsel for appellant is convinced that they could not support any judgment for appellee as matter of law.

6. Appellant thus urges most strongly, that the decision in this case is one barren of essential facts, and barren of fact findings supportable by admissible evidence, and that thus the trial and appellate courts have denied to this litigant the right and benefit to a decision on facts, as distinguished from conclusions unsupportable by admissible evidence; and that when the facts as shown by competent evidence are absorbed, there can be only one conclusion, viz, that appellant is entitled to judgment as prayed.

7. Proof positive that the misrepresentations of facts were material is appellee's written representation "that he has not contributed to the sales of the business except in immaterial amounts during the past year", thus inducing appellant to believe that the earnings' ability of the business was the sales' power of salesmen on a commission basis. That fact was conclusively proved by uncontradicted and controlling evidence thereof. The true fact was that appellee had contributed personally in the last year of his ownership of the business, and made sales of \$29,529, or 27% of the total sales of \$110,000, upon which there was \$5,458 of net income to the business upon which no commissions were payable. As such net income compares with net

income of only \$7,054 for 1949, or 77% thereof, we submit that it is error to say that such misrepresentation was not material. (See pp. 7-9 appellant's main brief).

8. Proof positive that appellee breached his contractual undertaking to appellant is his express contractual undertaking to appellant to

"AID THE BUSINESS IN ANY WAY HE REASONABLY CAN" as a paid Vice President and director. (Pl's. Ex. 1, par. e, p. 3; pp. 15-24 appellant's main brief), - which he failed wholly to do, but, instead, concealed critically important wrongdoing of his co-Vice President from appellant. (P. 25 et seq., appellant's main brief.) So that it was a breach of his contractual undertaking (as a vendor) to actually aid the business; and, by his concealment of facts, he actually contributed to the destruction of the business. Even if there were some slight evidence from which the court conjectured that appellee was not a de jure director and vice president, appellee was bound by his contract, as a vendor, to aid the business in any way he could, and it is undeniable that he breached his contract by concealing critically important facts from appellant that were destroying its business.

We respectfully submit that the facts and the admissible evidence, leave no genuine doubt that the trial court committed gross error, and that the judgment should be reversed.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT.

Certificate of Counsel:

I certify that the foregoing petition for rehearing is presented in entire good faith and belief, and that it is not presented for any delay whatever.

THADDEUS G. BENTON.